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LAW AND LIBERTY.*

Law is the condition of Liberty. Where Law is not, Will prevails, whether it be the Will of the One or of the Few or of the Many. Law is not the foundation of the State but the norm and regulation of the Force or Power that founds and maintains the State. Law makes it possible for the State and the people of a State to live a life of Liberty. Law is not a restriction on Liberty, it makes an arena, a canal for Liberty and thus energises it so that it may not overflow its banks. Whether, as in early times, in the form of Custom or later, in more political times, in the form of written Law, made by the deliberate and conscious action of man, Law has prevented the arbitrary will of man or any body of men from governing and regulating the life of the State. For, the properties of law, as Burke pointed out, are, *firstly*, that it should be known; *secondly*, that it should be fixed and not occasional, and, if we may add a *third* characteristic from Aristotle, that it is observed, for, to enforce obedience to the law, which it makes, is a proof of a good constitution of a State. While Law can be without Liberty—there can be systems of law made and developed by despotic governments like those of the ancient East and the later Roman empire—Liberty cannot exist without Law. The history of Liberty is in a large measure the history of the influence of Law in the government of man. At first whether primitive society was, as I believe, largely patriarchal and only exceptionally matriarchal, or not, Custom was the law of society.

*Lecture delivered on 13th February, 1939, by Mr. M. Ruthnaswami, M.A., C.I.E., of Gray's Inn, Barrister-at-Law, Member, Public Services Commission, Madras, under the auspices of the Madras Advocates' Association in connection with its Golden Jubilee celebrations under the Presidency of the Hon'ble Mr. Justice K. S. Krishnaswami Aiyangar.

The Leges Barbarorum of the German tribes, the Torah of the Jews, the Dooms of early English peoples, the Customs of Indian castes and tribes gave these peoples regularity, restraint and routine.

The rulers of custom-bound peoples were hardly despotic. They were as much bound as the peoples whom they governed. And then, when as a result of war and conquest, the authority of the chief increased, Custom gradually was transformed into Law. It came to be written, and codified. The Code of Hammurabi, the Twelve tables of Rome, the Brehon Laws of ancient Ireland, and the Code of Manu were still further steps in the growth of the influence of Law in human society. And this growing influence was in the direction of Liberty. For, however much restraint these ancient systems of Law may have placed on the activities of individuals or groups, they left still considerable areas of human activity to the freedom of individual initiative and movement. Even when they ruled a large part of man's life, as in the Code of Manu, yet they served the cause of Liberty, for, being written, known for certain and of general application, they freed man and society from the tyranny of the arbitrary will of individuals or groups.

No further step forward in the promotion of Liberty by Law could be taken as long as Law, as a result of this codification, was itself unfree. The principle of freedom had to be introduced into Law itself before Law could serve the cause of freedom. This work had been done for Europe in the later history of Roman Law. The Prætor's Edict, the Responsa Prudentium, and the Emperor's Rescript applied Reason to the development of the Law. But the Reason was that of a despot who legislated according to the maxim *Quod principi placuit, legis habet vigorem.* The will of the Prince had the force of law. Progress, but not freedom, could be served that way. It was with the coming of new peoples and of a new way and philosophy of life that Freedom was to enter into the history of Law. It was with the coming of the German tribes and of Christianity into Europe that the history of the relations between Law and Liberty begins. The primitive republicanism of the German tribes, their corporate life and self-government, their attachment to custom, and their ignorance of the State, would not tolerate the centralized despotism of the later Roman empire. And Christianity which came to meet the Roman empire as a

corporate Church, and with claims to the freedom of religious life was fundamentally opposed to absolutism in Law or Politics. These two influences combined soon began to operate on the Law of Europe in the direction of Liberty. The German tribes brought with them the idea and the practice of the people having a part in the making of law and the administration of justice. And the seeds of parliamentary government and the jury-system, these two props of English Liberty, were sown, though through royal Norman drills. Christianity, with the novel institution of the Church, unknown to pre-Christian times, and its own law, Canon Law, cut away large slices from the jurisdiction of the State and secular law. As you know, till late in English history Marriage and Will were under the jurisdiction of ecclesiastical courts. The principles of Equality, Liberty and Justice came gradually to be introduced in the tribal law and customs of the Saxons, the English and the Danes and slowly humanized and rationalized the administration of criminal justice. The rules of equity and good conscience influenced the decisions of the Court of Chancery. That, according to Maitland, saved Liberty against Roman jurisprudence and despotism. The Will, that instrument of liberty and progress, came to modify the rule of the dead hand of the customary disposal of property by Primogeniture or Borough English.

The Roman Imperial polity did not fail to influence the constitution of the early mediæval monarchies. It was especially in the field of judicial administration that this was felt. The Normans in England, Southern Italy and Sicily, the Capets in France took their idea of a royal, centralized administration of justice from the traditions of Roman imperial rule. To confine ourselves to England from whom we derive our modern system of administration of Justice, it was in the first place good for the development of Liberty that the court of justice was the first form of administration to shoot itself out of the royal court and household. The Judiciary thus acquired prestige and power which was to stand it in good stead and serve the cause of Liberty. The centralisation of the royal courts, which also went on eyre or circuit all over the country, the staffing of the judicial bench by professional justices, the building up of a common law out of the laws of the English as well as of ideas from Canon Law, French capitularies and from the Roman law-books, and the superiority of this royal justice in speed and

satisfaction to the old courts of the hundred and the shire, and to the new manorial courts of the feudal barons, brought about the legal unity of England.

The jury which was in its origin "French rather than English, rather royal than popular, rather the livery of conquest, than a body of freedom," brought popular representation into the administration of justice. Not only the Bench, but the Bar was early organized in England. The Bar in England also began its existence under royal auspices under Edward I, a process the details of which are still very obscure, and was instituted by the king. This brought the professional pleaders and the professional attorneys under the control of the judges and began to secure a monopoly of practice to those that had been formally ordained to the ministry of the law. The Inns of Court consisting of practising lawyers combined themselves into a guild of lawyers and had a monopoly of legal education. About that time members of the Bar began climbing to the Bench and the judges were ceasing to be ecclesiastics. About that time, the old Curia of the Norman kings was dividing itself into the King's Bench, the Court of Common Pleas or the Common Bench, the Court of Exchequer, and the great Court of Chancery. Another cause that contributed to the development of the Judiciary as a free and powerful institution was that the development of the la v was largely in its hands. Parliament was not in those days so fond of making laws as it is to-day. Although the Parliament of the 13th and 14th centuries did legislate in general, they left the ordinary law of the land and the development of the common law to the lawyers. Even in the time of the Tudors and the Stuarts the Star Chamber and the Chancery, although they were dangerous for Liberty, served to preserve Common Law for, but for these institutions, as Maitland has shown, the old-fashioned national, law unable out of its own resources to meet the requirements of the new age of commerce, maritime development and colonization and international intercourse, would have utterly broken down and the "ungodly jumble," as Cromwell called, it of English common law would have made way for Roman jurisprudence and for despotism.

It was these traditions of a centralized, free and independent Judiciary that came to India when the foundations of the British administration of justice were laid in the country. As in

Meetings Acts, Defence of India Acts and by the use of old Regulations like that of 1818 to be explained by peculiar and temporary conditions and circumstances. Yet the core of Liberty stands. In India, as in England, whatever restrictions on fundamental liberties exist, are to be found in the civil and especially in the criminal law and not in administrative powers or discretion. The separation of powers is not provided for, but is recognised by the Government of India Act, though the independence of the Judiciary is assured by the provisions in regard to the tenure and salaries of Judges of the High Courts and the Federal Court. The separation of powers is not absolute and rigid in British India. Nor is it in England and in the U.S.A. Montesquieu's doctrine which was based upon a misunderstanding of the facts of the English constitution, has to be interpreted in the sense of Madison, one of the makers of the constitution of the U.S.A., namely, "that the whole power of one department should not be exercised by the same hands which possess the whole power of another department." Otherwise the Ministry could not be part of the Legislature as in England and the Senate could not take part in the executive act of appointment of judges and other high officials in the U.S.A. And on the *vexata quaestio* of the separation of the Executive from the Judiciary in India, this argument I have not found used by the supporters of the small admixture of judicial and executive functions, which obtains in the case of English justices of the Peace as in that of Indian Collectors and Magistrates. But the strongest shield of Liberty, the independence of the Judiciary is secured. It would be still more secure if, except in regard to appointments which, everywhere is the function of the Executive, administrative functions in regard to postings, transfers and promotions lay in the hands of the Head of the Judiciary; but since the Head of the Judiciary is not part of the Executive as in England in the person of the Lord Chancellor, executive influence in these matters could be secured by regular consultation between the Head of the Judiciary and the Head of the Executive.

Following the traditions of the English Courts, Courts of Law in India have acted as defenders of individual Liberty. In the great line of English judicial decisions that have secured the rights and liberties of the subject may be added cases decided in the Indian Courts. The decision in *Secretary of*

State for India v. *Moment*[1], secured to the subject the right to sue the Secretary of State in Council in any case in which he could have similarly sued the East India Company. In *Ameer Khan, In re*[2], although the judges allowed that common law rights and liberties could be suspended by statutory enactment they granted that the Liberty of the subject was the unwritten law of the constitution. The case of the *Inhabitants of Mahalingapore* v. *Anderson*, like *Phillips* v. *Eyre*[3], established the principle that a Governor is liable to an action in England for a wrong done by him during his government. *Arnold* v. *The King-Emperor*[4], affirmed the principles of the freedom of the Press for, "the freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length the subject generally may go, so also may the journalist, but apart from statute law his privilege is no other and no higher." These are illustrations of the way in which in India, as in England, the Courts of Law have come to the defence of the Liberty of the subject.

It is not merely against the Executive that the Judiciary acts as the shield of Liberty. As a consequence of the modern democratic theory, the Legislature which is the representative of the people is considered to be the supreme power in the State. And, as the modern State, according to the same theory, is omnipotent and omnicompetent, so the Legislature also is said to possess omnipotence and omnicompetence. It is against such a powerful legislature that defences have to be thrown up in the interests of Liberty. This was realized not the other day but at the time the constitution of the United States of America was established. There, for the first time in the history of the world, the people of a large modern State had charged themselves with the right and duty of government. And jealousy of executive power which their relations with the English monarchy had taught them, directed that they should make their legislature powerful. Some of the makers of their constitution already realized the risks of a powerful legislature dependent on democratic election. One of them, George Cabot, said, "There will be neither justice nor stability in any system if some material parts of it are not independent of popular control." Alexander

1. (1912) 24 M.L.J. 459: L.R. 40 I.A. 48: I.L.R. 40 Cal. 391 (P.C.).
2. (1870) 6 Beng.L.R. 392.
3. (1870) 6 Q.B. 1.
4. (1914) A.C. 644.

Hamilton said while the constitution was in the making in the Convention, "the members most tenacious of republicanism are as loud as any in declaiming against the evils of democracy. Give all the power to the many and they will oppress the few." One of the most powerful means by which the framers of the constitution of the United States of America hoped to check democratic tyranny was the establishment of an independent, impartial, and stable Judiciary. The Judiciary was made independent of the Executive and of the Legislature. "It was their duty", said Mason of Massachusetts, "to expound not only the laws but the constitution also; in which is involved the power of checking the Legislature in case it should pass any laws in violation of the constitution." That constitution made the Judiciary its defender for, in Art. 6 it was laid down that "this constitution and the laws of the United States which shall be made in pursuance thereof and all Treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Thus the Judiciary was made defender of the constitution; it was given the right to pronounce judgment on the constitutionality and legality of any law passed by any legislature or by any executive order or direction. Although the people were the ultimate makers and amenders of the constitution, the Judiciary was made the guardian of the constitution as it exists. Thus the Judiciary became the balance wheel of the constitution. And from the beginning the Judiciary fulfilled this duty of defending Liberty against the invasions of the Executive or of the Legislature. Chief Justice Marshall stands out as the defender of the constitution and of Liberty during his long tenure of 34 years of the office of Chief Justice of the Supreme Court. From the case of *Marbury* v. *Madison*[1], when the writ of mandamus was awarded against the administration for the performance of executive acts which they refused to perform, although they were required by the constitution to perform them, through the case of *Aaron Burr*[2], when he destroyed the attempt to set up a law of "constructive treason," and *Fletcher* v. *Peck*[3], when the

1. Cranch, 137, 2 L. ed. 60.

2. *See* account of the trial in Beveridge's Life of John Marshall Vol. III.

3. 6 Cranch, 87, 3 L. ed. 162.

UNIVERSITY OF CALCUTTA ★ DEPARTMENT OF LAW ★ NOT TO BE REMOVED

Court declared a state law impairing the obligation of contracts invalid, down to *Worcester* v. *Georgia*[1], when he declared that the Chirokee nation "is a distinct community occupying its own territory in which the laws of Georgia can have no force and which the citizens of Georgia have no right to enter but with the consent of the Chirokees themselves or in conformity with treaties and with the acts of Congress." Marshall defended individual Liberty against the onslaughts of the Executive, the States; and the Legislature. And the tradition set up by Marshall has been followed by the Judiciary of the United States of America ever since—to the detriment of progress perhaps, but in the interests of Liberty.

Like the United States of America, India also has a written and a federal constitution. Although the federal constitution set up by the Government of India Act of 1935 is *sui generis*, extraordinary, peculiar and unique, like nothing on earth in the history of federation, yet it has some of the fundamental principles of federal constitutions. It is a written, rigid constitution, with an efficient but not absolute separation of powers, with checks and balances, no power being sovereign, Indian States and British Indian Provinces brought under one umbrella and the whole system of government being placed under the protection of a constitution which is the supreme law of the land. And the defender of this constitution and therefore of Liberty against the interference of Executive or Legislature is the Judiciary. The High Courts and Subordinate Courts have always had the right and the power to pronounce on the validity of laws passed by the not sovereign legislatures of India. But the Government of India Act of 1935 has placed the constitution under the special protection of a new Court for all India—the Federal Court. It is a Court of record like the High Courts; it is to have, to the exclusion of any other Court, an original jurisdiction in any dispute between the Federation or any of the Provinces or any of the Federated States and in so far as the dispute involves any question (whether of law or government) on which the existence or extent of a legal right depends, although the extent to which the Court has jurisdiction over disputes to which a State is a party, is limited by the terms of the Instrument of Accession by which the State agrees to enter the Federation. As from High Courts in Federated States

1. 6 Pet. 515, 8 L. ed. 483.

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appeals are to lie to the Federal Court on questions of law concerning the interpretation of the Constitution Act or of an order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by the Instrument of Accession of the State or which arises under an agreement made in relation to the administration in that State of a law of the Federal Legislature. In spite of the serious limitations on the jurisdiction of the Federal Court, in the Indian States that federate, it is a great step forward that disputes between individuals and individuals and States and States and Provinces and Provinces and all of them and the Federation in regard to matters provided for in the Act should become justiciable in a Court of law common to all India. It is not only the first step towards the legal unity of India but a long step forward in the protection of Liberty in India. Although Treaties are not *ipso facto* the law of the land in the British Empire as in the United States of America, yet the consideration that they may become evidence in cases before the Federal Court in which the States are interested may bring them up for judicial interpretation. One provision in the Act may detract from the repute of the Federal Court as a Court of law. It is S. 213 which empowers the Governor-General to consult the Federal Court on questions of law of public importance. This, although allowed by the analogy of the Judicial Committee of the Privy Council and Dominion practice, infringes the principle of the separation of powers and the salutary principle that Courts of law should adjudicate only on specific issues raised as a matter of fact before them. It is no part of the business of a Judiciary to act as the adviser of the Executive. The Executive must take responsibility for its acts; enough legal advice is available to it, and it must not be allowed to justify its action in shelter behind the Judiciary and the Judiciary must not in any way or to any extent mix itself with executive action.

The inconveniences of this consultation have been pointed out in the Dominions but the danger to Liberty was sensed by Chief Justice Marshall who, when asked by President Washington to give an advisory opinion as to the validity of certain treaties with France, held, "that the Supreme Court was merely a legal tribunal for the decision of controversies brought before them in legal form." The Missouri Compromise delimiting the

regional legality of slavery declared unconstitutional by the famous *Dred Scott case* 37 years later which precipitated the greatest civil war in history, is an illustration of the danger to which a country may be subjected by the resort to consultation by the Executive of the Judiciary in justiciable matters. The controversy over the Missouri Compromise and the *Dred Scott case* would have been still more disastrous if the action of the Government had been supported by judicial opinion.

The place of the Judiciary in a federal constitution as in a State where the Rule of Law obtains makes for eminently a "government of laws and not of men." A government of laws is a free Government because it is above the caprice and will of one man or a body of men. The "law of the land" was the battle cry of those that won the Magna Charta in England and the "due process of law" is the American guarantee of Liberty. "Liberty to be enjoyed must be limited by law," said Burke, "for law ends where tyranny begins and the tyranny is the same, be it the tyranny of a monarch or of a multitude—nay the tyranny of the multitude may be greater as it is a multiplied tyranny." It is only

> " Where Sovereign law, the State's collected will,
> Over Throne's and globes elate,
> Sits empress, increasing good, suppressing ill,"

that Liberty is secure.

Perhaps an apology is needed for placing these elementary truths and facts connected with the administration of Law and Justice before a body of lawyers. I find an excuse for this exploitation of the obvious, as some of you may be tempted to characterise my observations, in developments in Law that have taken place in certain countries in our generation. We have lived into times when the old notions of the supremacy of Law over government, of the guarantee of individual Liberty by Law, of the State being under the Law have been questioned and treated with scorn. The characteristic note of the judicial life of the State of the Dictators is that Law is not so much the guardian and defender as the faithful and obedient servant of the State. Here, in regard to Law under the National Socialist State of Germany, is the authoritative statement of Dr. Franz Gurtner, Reich Minister of Justice who contributed an article to a collection of essays by leading members of Party and State called "*Germany speaks*" recently published in England. "The doctrine," he says, "that demands that the interests of the

individual must be regarded as the principal subject-matter of all legislation and that a comprehensive system of controls must be established to protect the individual against an excess of interference by the State," is no longer upheld in Germany. National Socialism, we are told, "looks upon the community and the nation as an organism which has its own rights and duties and whose interests come before those of the individual". The lawyer under the Nazi regime is to espouse not the interests of the individual but those of the whole nation. But the climax of this dangerous development of Law was reached on 28th July, 1935, when a law was passed which abolished the maxim according to which no offence can be punished unless it is specially mentioned in the existing Code. This law entitles the judge to inflict punishment for acts which, although not specifically mentioned, are yet "of such a nature as to demand punishment in pursuance of the general terms of the law and in accordance with healthy, national sentiment." This doctrine of 'constructive crime' is the *ne plus ultra* of a lawless system.

May I end with an appeal from one who is a citizen rather than a lawyer, to this eminent body of lawyers? According to the English system, the Bar is an integral part of the judicial administration. Judicial enquiry into a dispute consists, for the main part, in a debate between learned counsel representing the two parties to the dispute. In the United States of America they have an expressive phrase to describe this process. The lawyers are said to be engaged in "trying the case". The integral and efficient part played by the Bar in the administration of Justice in England and in the United States of America has been made possible by the learning, the high tone, and the independence of the Bar. The independence of the Judiciary, so necessary in a free State, is dependant on the independence of the Bar. And independence of the Bar can be attained only if members of the Bar keep to the highest standards of professional conduct and character. All these qualities of the Bar in England and the United States of America are to be traced to the unity and corporate life and status they have enjoyed from the earliest times. That the Bar in Madras may grow in that incorporated unity, freedom and independence so necessary to the free and progressive administration of Justice must be the wish of every one that believes in the vital connection between Law and Liberty.

SUMMARY OF ENGLISH CASES.

CAXTON PUBLISHING COMPANY, LIMITED *v.* SUTHERLAND PUBLISHING COMPANY, (1939) A.C. 178 (H.L.).

Copyright Act (1911), Ss. 6, 7 and 10—Infringement—Damages for infringement under S. 6 and damages for conversion under S. 7—Remedies whether cumulative or alternative—Limitation under S. 10 for commencement of proceedings—Act of conversion—What constitutes—Measure of damages.

The plaintiffs are the owners of the copyright in a book "Heating and Ventilating" and defendants, the publishers of a book "The Modern Practical Plumber". The defendants admitted that portions of four sheets of their book are infringements of the plaintiff's copyright. The plaintiffs by their writ claimed (1) an injunction restraining infringement, (2) an inquiry as to damages, and (3) delivery of all infringing books and materials. The defendants admitting the infringement contended (1) that the plaintiffs were not entitled to both damages for infringement of copyright under S. 6, sub-S. 1 and at the same time damages for conversion under S.7; (2) that the limitation of 3 years under S. 10 applied to the claims under S. 6 as well as S.7; (3) that the conversion was the printing or binding and not the sale; and (4) that the damages were not to be calculated by finding the price of their complete work and then attributing to the plaintiff's copyright some portion of that price but was the value of the plaintiff's work to the plaintiffs as contained in the four sheets. (At the hearing before the House of Lords they were content to take the binding as the act of conversion and both sides accepted that if damages for conversion were to be calculated by reference to the value of the whole volume the proportion was to be one-twentieth.)

Held, (1) that the remedy of damages for infringement provided by S. 6 and the remedy of damages for conversion provided by S. 7 are not in law mutually exclusive and that the plaintiffs are entitled to recover under both heads.

(2) that the three years' limitation provided in S.10 applies to a claim of damages for conversion under S. 7.

(3) that the act of conversion was the binding of the infringing sheets with the innocent ones.

(4) that the plaintiffs being fictional owners of the infringing copies, where the infringing copies are found in a setting created by the defendants, the Court in assessing the damages, is entitled and bound to take that setting into account and that will be fairly done in taking some proportion of the total value of the book after

making due allowances for expenses incurred after the act of conversion.

(1936) Ch. 323; affirmed. (1938) Ch. 174, reversed.

RADCLIFFE *v.* RIBBLE MOTOR SERVICES, LTD., (1939) A.C. 215 (H.L.).

Master and servant—Liability of master for accident to servant caused by another servant—Defence of "common employment"—Limits.

The respondents were the owners of a number of motor coaches and omnibuses used for private hire and public transport. *R* and *J* were drivers employed by them and on a certain day three coaches were hired for one party, and two single coaches for two others by the same firm of transport agents. All three parties were bound for the same destination. After discharging the parties the coaches were returning to the garage. *R* who was driving one of the coaches stopped his coach and got down and *J* who was driving another coach while pulling out to get in front of the first coach and passing close to it inflicted injuries on *R* who died of it. In an action under the Fatal Accidents Act by *R's* widow,

Held, there are conditions in which the law will not hold a master liable for injuries caused to a workman by the negligence of his fellow workman employed by the same master and engaged in a common employment with him. But in the present case, having regard to the nature of the employment there was no common work justifying the conclusion that the deceased man's contract of employment was subject to the fictitious implied term that he assumed the risk of his fellow servant's negligence while driving his employer's coach on the highway on a separate job. The doctrine of "common employment" did not apply. History of the doctrine discussed.

Decision of the Court of Appeal, (1938) 2 K.B. 345, reversed.

GOVERNMENT OF THE REPUBLIC OF SPAIN *v.* S. S. "ARANTZAZU MENDI", (1939) A.C. 256 (H.L.).

*International law—Comity of nations—*De facto *Government of a State—If foreign Sovereign State entitled to immunity from being impleaded in English Courts—Writ* in rem *for arrest of a ship which a* de facto *foreign government claimed to be in possession or entitled to possession—Validity.*

The Republication Government of Spain requisitioned the ship in question and other vessels for public services. The ship was then on the high seas and on her arrival in London on 11th August, 1937, the owners issued a writ *in rem* for possession and in pursuance thereof was arrested by the Admiralty Marshal in the Surrey Commercial Docks. To that writ the Republican Government entered a conditional appearance. On 28th March, 1938, General Franco issued a decree requisitioning the ship for public services. On 11th April, 1938, the owner's action was discontinued but the vessel still remained under arrest and on 13th April, the managing director of the owners made a notarial declaration that he consented to the order of requisition and held the vessel at the disposal of the Nationalist Government and the master made a similar declaration. On the same date the Republican Government issued the present writ *in rem* against the vessel and its late master for an adjudication of possession of the ship to them. The Nationalist Government sought to set aside the writ on the ground that it impleaded a foreign Sovereign State which was unwilling to submit to jurisdiction of the Court.

Held, affirming the Courts below, that the Nationalist Government of Spain represented a foreign Sovereign State which could not be impleaded and that was established by the Foreign office letter to the Court that "the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain and is not subordinate to any other Government in Spain". The right of the Marshal who merely arrested the ship is not possession but custody and the Nationalist Government was in possession of the ship at the material date. Though the writ was against the ship, the Nationalist Government was impleaded as they were in possession. So the action must be dismissed.

VITA FOOD PRODUCTS *v.* UNUS SHIPPING CO., LTD (IN LIQUIDATION), (1939) A.C. 277 (P.C.).

Contract—Bill of lading issued from Newfoundland providing that contract shall be governed by English Law—Bill of lading not containing statement required by Newfoundland Carriage of Goods by Sea Act, 1932, S.3—Action for damages to goods against shipowner in Nova Scotia—Law applicable to the contract.

By some error or inadvertance, the bills of lading (for having shipped to the appellants in respondent's ship from Newfoundland) were on old forms and did not incorporate the Hague Rules which had been adopted by the Carriage of Goods by Sea Act (Newfoundland). After setting out the exceptions of sea and

other perils and exemption from liability for all damage capable of being covered by insurance and exemption from damage from negligence of shipowner's servants, etc., the bills provided that the contract shall be governed by English Law. The bills did not contain an express statement that they are to have effect subject to the provisions of the rules as required by S. 3 of the Newfoundland Carriage of Goods by Sea Act, 1932. In an action by the appellants in Nova Scotia against the shipowners for damage caused to the goods admitted as due to the captain's negligence in navigation.

Held, the proper law of the contract is the law which the parties intended to apply and the intention expressed in the contract will be conclusive and English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with S. 3 of the Newfoundland Act. On a true construction of the Statute, S. 3 is directory and not obligatory and failure to comply with its terms does not nullify the contract contained in the bills of lading.

The Torni, (1932) P. 78, not followed.

Even on the footing that the bills of lading were illegal the respondent would fail either because it was a party to an illegality avoiding the contract or alternatively because the contractual exemption could not be ignored. The respondents were not liable for the damages.

THE WESTHOUGHTON COAL AND CANNEL CO. *v.* WIGAN COAL CORPORATION, (1939) 1 Ch. 393.

Mining—Artificial water-course constructed in a mine—Escape of water into lower mine—Liability for damage—Principles.

If an artificial channel has been constructed in a mine, the maker of such artificial channel is not liable for all time for damage to another mine, if water should at any time escape down the artificial water-course into the neighbouring mine, by reason of the acts of the owner of the lower mine or other parties, done after the construction of the artificial water-course. The maker of an artificial channel is liable to the owner of the lower mine for damage caused by escape of water if it is due to the increased burden. If the construction has not increased the burden to any appreciable extent, there is no liability. The time when the question whether there is such an appreciable increase of the burden on the adjoining mineowner with regard to the water, falls to be considered, must be the time, when the artificial water-course is con-

structed and the material circumstances must be those obtaining on that date.

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE AND OTHERS, (1939) 1 Ch. 441.

Mortgage—Redemption—Postponement of—If must be for a reasonable time—Provision for redemption in eighty equal half yearly instalments—If a clog on the equity of redemption—Rule against perpetuities—If applicable to mortgages.

The respondents, the owners of a large freehold estate owed on a mortgage dated 6th May, 1927, carrying interest at 6½ per cent. per annum 3,00,000*l.* to a certain company. In January, 1931, the appellant society agreed to grant to the respondents a loan of 3,10,000*l.* at 5¼ per cent. interest per annum repayable over a period of forty years by half-yearly instalments, the whole money to become payable on any default. On 6th November, 1931, a mortgage embodying the agreement was executed in favour of the appellants. On 25th February, 1937, the respondents issued a writ claiming to be entitled to redeem the mortgaged property on the usual notice notwithstanding the provision for repayment by eighty instalments spread over forty years, claiming that "the condition is illegal and void as a clog on their right to redeem and renders it irredeemable for an undue length of time and is not capable of being enforced".

Held, reversing the decision of Luxmoore, J., in (1938) Ch. 741. The proposition that a postponement of the contractual right of redemption is only permissible for a "reasonable" time is not well founded. Even assuming it must be reasonable, there is nothing unreasonable in the mere extension of the period for forty years in the circumstances of the present case.

A postponement of a contractual right of redemption for forty years cannot properly be described as a clog on the equity of redemption. Equity will grant relief only where as in (1912) A. C. 565, the contractual right of redemption is illusory or where there is something oppressive or unconscionable in the transaction.

Held, further, affirming Luxmoore J.'s decision. The rule against perpetuities has never been applied to mortgages and it would not be right now to hold that the rule was applicable to mortgages.

In re VAUX. NICHOLSON *v.* VAUX, (1939) 1 Ch. 465.

Wills—Trust or powers under which an interest can be created to take effect more than 21 years after a life in being at the death

of the testator—If offends rule against perpetuities—Benefit under settlement after will—Rule against double portions—When applicable.

The testator died on 25th November, 1925, leaving his widow, two sons and two daughters. All the children attained 21 and one son died after attaining 21 in 1936. By the will dated 27th November, 1919, the testator after devising the estate on usual trusts to his executors and trustees, gave the widow a life interest to be cut down on her remarriage and directed the appropriation of two sums of £20,000 each for each of his daughters; and by cls. 11 and 12 of the will disposed of the residue. Cl. 11 was as follows: "As to the residue my trustees shall . . . . . apply both the income and capital, in their absolute discretion for the benefit of all or any one or more of my children or the issue of any deceased child of mine. And . . . the trustees may within 21 years from decease accumulate the surplus of any income of the residuary trust fund . . . and add it to the trust fund . . . . . " Cl. 12 was in the following terms, ". . . I authorise and empower the trustees to deal with the fund as I could have done if living save only that all such dealings shall be within the limitations prescribed by law". Subsequently on 9th September, 1924, he settled 2,000 shares in a company on each of his four children.

Held [reversing (1938) Ch. 581]: (1) The power conferred by cl. 12 of the will was valid by reason of the saving words at the end though the trusts declared in cl. 11 were void as offending the rule against perpetuities as the trust is one under which an interest can be created at a date more than twenty-one years after any life in being at the death of the testator. (2) In the circumstances of the case the settlement of 9th September, 1924, in favour of the children has no reference and cannot be treated as having any implied reference to the benefits conferred upon the settled parties by the will and was not an advancement of the gifts by the will. The rule against double portions was not applicable.

In re A DEBTOR. DEBTOR *v.* OFFICIAL RECEIVER, (1939) 1 Ch. 489.

Bankruptcy Act (1914), Ss. 26 and 108 (1)—Jurisdiction to rehear and review—If terminated by discharge in bankruptcy—Discharged bankrupt—Jurisdiction of Bankruptcy Courts to make binding orders on.

On 30th June, 1936, the debtor applied for his discharge. At that time the receiver made an application under S. 51 (2) of the Bankruptcy Act for an order for the payment of a portion of his

salary by the debtor to the trustee in bankruptcy. In the discharge application it was found (*i*) that the assets were insufficient to pay 10*s*. in the pound; (*ii*) that the bankrupt had brought on his bankruptcy by unjustifiable extravagance in living. On 15th December, 1936, an order was made. It suspended the discharge for six months and discharged him as from the expiration of the six months "without prejudice to any application or order under S. 51 (2)." The application by the receiver was ordered on 17th December, 1936, directing the payment by the bankrupt a sum of £312 annually during the bankruptcy to be continued monthly until the Court ordered to the contrary. Liberty was reserved to either party to apply. It was the intention of the Registrar that the payment of £312 should continue to operate even after the six months' suspension had elapsed. It was also in contemplation that after the debtor had cleared the undischarged income-tax liability towards which he was paying £20 per week an additional sum would be ordered to be paid. In fact the bankrupt continued to make the payment for nearly a year after expiry of six months. Then his solicitors took the point that under the order the obligation to make the payments came to an end when the discharge date arrived and claimed repayment of the sums which had been paid subsequent to the discharge. On 6th July, 1938, on an application the Registrar declared (*i*) that the Court had no jurisdiction to make it a condition, in granting the bankrupt his discharge subject to a suspension that the same be without prejudice to an order to be made under S. 51 (2) in so far as that order is intended to operate after the period of suspension runs out; (*ii*) that the order dated 17th December, 1936, was not made under or by virtue of the words 'without prejudice' in the order of 15th December, 1936, but under the powers conferred by S. 51 (2) which can be exercised at any time up to the discharge of the bankrupt taking effect and that such an order comes to an end on the discharge becoming effective; and (*iii*) "During bankruptcy" in the order of 17th December, 1936, refer to the period during which the bankrupt remained undischarged. The Registrar at the end of his judgment indicated that if the Court had jurisdiction, it can review its previous order of discharge and make an order of the kind which it had intended to make originally. The Official Receiver accordingly made an application for review under S. 108 (1) of the Bankruptcy Act and the Registrar altered the order of discharge. On appeal by the bankrupt,

Held, under S. 108 (1) Courts have power to review, rescind or vary any order made by it under its bankruptcy jurisdiction and it is not terminated by a mere discharge in bankruptcy. If one

reads the provisions of S. 26 together with S. 108 (1) it is impossible to say that an imposition of a condition under the power in S. 108 (1) is not a concurrent exercise within the meaning of S. 26 (8). The jurisdiction under S. 108 (1) to rehear is one that must be exercised with great caution, but the power is there and is intended to be exercised and in a proper case ought to be exercised.

In re LONDON GENERAL INSURANCE Co., (1939) 1 Ch. 505.

Company—Compulsory liquidation—Company carrying on different kinds of assurance business—Assets how to be distributed between various classes of creditors—Assurance Companies Act, 1909, S. 3—Meaning.

The company was carrying on life assurance, bond investment, motor insurance, fire insurance, and general accident businesses and on the date of the winding up it had creditors whose claims arose exclusively out of transaction with one or other of such businesses and also general creditors whose claim did not relate exclusively to any such businesses. In a summons for directions as to whether any and which of such creditors have a security upon any and which of the company's assets,

Held,—All the creditors rank *pari passu* against all the assets of the company except in so far as the receipts of either the life assurance fund or the bond investment fund can be traced into any particular assets. The obligation under the Assurance Companies Act, S. 3 (1) to keep separate accounts of receipts in respect of the various businesses seems to be merely an obligation as to the method of keeping accounts and only if it be possible in the books of the company to trace receipts from the class of business for which a separate assurance fund has to be kept, into a particular asset any such asset would be a security for the debts of creditors arising exclusively out of that class of business.

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS, (1939) 1 Ch. 520.

Building Societies Act, 1874, Ss. 13, 25—Society advancing loan on collateral security by builder in excess of normal amount which it would advance on the security of the house—Infringement of rules of society—Effect.

By S. 13 of the Building Societies Act the fund raised by subscriptions of members can be advanced only to members of the society and on the security of freehold and the leasehold estates by way of mortgage. The rules of the plaintiff society narrowed the limits imposed by S. 13 as to the amount which may be advanced

out of the funds to such an amount as can be recovered out of the land taken as security.

Where it was found that the directors of the plaintiff society on the collateral security of the builder advanced a loan in excess of the normal amount which they would have advanced on the security of the house to the defendant and it was a violation of the rules of the plaintiff society.

Held, a mere violation by the directors of the plaintiffs of the rules will not invalidate the transaction. So long as the transaction is not outside the powers of the plaintiffs as defined by the Act of Parliament it is not an illegal or invalid transaction or one which the plaintiffs cannot enforce.

In re NORBURY. NORBURY *v.* FAHLAND, (1939) 1 Ch. 528.

Wills—Legacy "free of duty"—Foreign duties—If payable out of estate.

Where an English testator by an English will gives a pecuniary legacy "free of duty" the only duties payable out of his estate in respect of the legacy are duties imposed by English Law, unless there are words in the will making it clear that duties imposed by the law of a foreign country are to be paid out of such estate.

TRANSPORT AND GENERAL CREDIT CORPORATION, LTD. *v.* MORGAN, (1939) 1 Ch. 531.

Contract—Sale of goods—Vendor's lien—If available in respect of ordinary commercial goods—Equitable lien—Estoppel—Effect—Agreement to finance hire purchase transactions —If "Money-lending" transactions—Companies Act (1929), S. 266—Floating charge—Notes issued within six months under trust deed executed more than six months before winding up—Validity of charge.

A trust deed of 14th July, 1937, by which Rawire, Ltd., was incorporated recited that the whole of the issued share capital of Rawires were owned by or on behalf of Warners, Ltd., and Rawires' sole business consisted of purchase of radio sets, etc., from Warners and others and subsequently entering into hire purchase agreements in respect of those goods with customers. Borrowing powers were conferred on Rawires and due payment was guaranteed by Warners. Rawires issued notes (which gave a floating charge) and on default in payment the plaintiffs a credit corporation seeking to enforce some of those notes got a receiver appointed on 18th February, 1938, under the provisions of the trust deed. The receiver collected the instalments under the hire purchase agreements

as they became due, recovered possession of some chattels on default of the terms of the hire purchase agreements and received the proceeds of sale of certain articles. Both Rawires and Warners went into voluntary liquidation by May, 1938. In an action to enforce the security it was contended that the transaction was a money-lending transaction and was invalidated by the Money-lenders Acts 1900 to 1927, and that Warners had a vendor's lien in respect of the unpaid purchase price of the goods.

Held, the transaction was not a money-lending transaction and the date of the charge is the date of the trust deed and not of the note and the notes though issued within six months of the liquidation were not invalidated by S. 266 of the Companies Act, 1929.

The equitable doctrine of a vendor's lien has never been held to apply to the sale of ordinary commercial goods. If it should apply, it has been waived by Warners and Rawires being entirely controlled by Warners, Warners are estopped from setting up such a lien. The plaintiffs and the other note holders were entitled to the security.

LEWIS *v.* DENYE, (1939) 1 K.B. 540.

Tort—Master and servant—Dangerous machinery—Failure to fence—Liability for injury—Contributory negligence—Effect.

The infant plaintiff who met with an accident while working on a circular saw sued for damages occasioned by a breach of statutory duty by the defendant to securely fence the saw. It was found on the evidence that the plaintiff knew that he could have avoided all risk by using the proper apparatus and that he failed to take reasonable care and his omission so to do must have been the effective cause of the accident.

Held, the contributory negligence of the plaintiff disentitles him from succeeding. The question of the legal effect of a breach of statutory regulation by a plaintiff on his right to sue, was left open.

HEPPENSTALL *v.* JACKSON AND BARCLAYS BANK, LTD., (1939) 1 K.B. 585.

Garnishee order—If attaches to amounts received by garnishee after service of order.

The garnishee, a bank had an order served upon them in the usual way under County Court Rules, O. 27, r. 1 attaching any debt owing by the bank on the date of service to the judgment-debtor.

On receipt of the order, the bank opened a new account for the particular customer in which the new credits, due to payments in, appeared.

Held, a garnishee order attaches no debts which do not exist at the moment the order is made and served and the applicant for a garnishee order is required both by the Rules of the Supreme Court and County Courts. Rules to swear an affidavit as to the amount of the debt alleged then to be owing to the judgment-debtor and the jurisdiction to make the order is limited to debts so proved by affidavit.

THE KING *v.* FINDLATER, (1939) 1 K.B. 594.

Companies Act (1929), S. 356, sub-Ss. (1) and (7)—Sale from house to house of "units" by which the holders were to receive a proportion of the profits of the Company and to whom return of capital was assured in 21 years—If offence under S. 356, sub-S. (1)—Ignorance that system was unlawful—If can excuse consequence of guilt.

A company through canvassers from house to house sold some "units" the features of which was that the subscribers were to be paid a portion of the profits of the Company and also return of capital to holders of unit was assured within 21 years.

Held, this constituted an offence under S. 356, sub-S. (1) and though the appellant, a director, did not know that the system was unlawful he was guilty of the offence.

MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY, LTD, (1939) 1 K.B. 621.

Workmen's Compensation Act (1925), S. 43 (2) (b)—Date of disablement in a case where workman dies without having obtained certificate of death—Date of death if date of accident.

A workman after nearly a year's illness died from lead poisoning (found only on *post mortem* examination) in the course of employment. Arbitrator awarded compensation to his dependants against the employer. The employers claimed that the insurance company were bound by a policy of insurance to indemnify them against their liability to the dependants of the deceased. The insurance company contended that under Workmen's Compensation Act, 1925, S. 43, the workman must be deemed to have contracted the disease which caused his death on the day when he died—eight months after the policy had expired and so not liable under the policy.

Held, the modification in S. 43 (1) (iii) (*a*) that *disablement or suspension shall be treated as the happening of the accident* has

no application to the case where the workman had died from a scheduled disease without having obtained a certificate of disablement and without having been suspended from his usual employment and so the employers are in law entitled to the indemnity claimed.

UNITED STEEL COMPANIES, LTD. *v.* CULLINGTON, (1939) 1 K.B. 644.

Income-tax—Finance Act (1926), Ss. 32 and 33—Amalgamated Company—If entitled to deductions in respect of losses and wear and tear to machinery to which the companies which were amalgamated were entitled.

Two companies *A* and *B* were amalgamated into a new company in 1930. Companies *A* and *B* continually made losses in respect of which they were unable to obtain relief under Income-tax Act, 1918, S. 34. The *B* company was further unable to give effect to the deductions for wear and tear to machinery which it was entitled to. In respect of the deductions thus carried forward by the two old companies relief was now claimed by the amalgamated company.

Held, the case falls to be decided upon the plain construction of r. 11 as enacted by the Finance Act, 1926, S. 32. The trade is to be treated as a new trade set up or commenced at the date of its acquisition. The company is another legal *persona* and cannot claim the right to deduction in respect of losses and wear and tear of the old companies.

FISHER *v.* WINCH, (1939) 1 K.B. 666

Boundaries—Hedges and ditch—Presumption—Rebuttal by production of title deeds.

The respective position of a hedge and ditch as affording evidence of the boundary is a mere presumption and can be rebutted by the production of title deeds.

THORNETT *v.* BARCLAYS BANK (FRANCE), LTD., (1939) 1 K.B. 675.

Practice—Production of documents—Banker's books—Issue whether bank did investment business for clients—Inspection of transactions other than plaintiffs—Procedure.

The plaintiff sued the defendant her bankers on the allegation that during 1935, 1936 and 1937 *C*, the manager of the bank (who was also plaintiff's son-in-law) had in fact dealt with her securities purporting to advise her about them as if he were acting for the

bank, with the result that the whole of plaintiff's fortune was dissipated. She alleged that the defendant's manager was guilty of (1) negligence in giving her advice and (2) fraud in giving her false statements as to her investments showing her to be a rich woman with knowledge of their falsity. These were alleged to be within the scope of the manager's authority. The bank denied negligence and fraud and alleged it was not within the scope of *C's* authority to advice clients in such matters. The defendant bank filed affidavit of documents in due course. Plaintiff applied for a further discovery of a book containing records of commissions earned by the bank on sales of securities. This was resisted by the bank as to entries relating to other customers.

Held, if the defendant bank will answer the interrogatory as to the total of the half commissions earned by the bank on purchases and sales during the three years, then the plaintiff should not have inspection of the book. As the book is to a limited extent relevant, if the bank is not willing to answer the interrogatory liberty to inspect the whole book should be given to the plaintiff.

REX *v.* BOURNE, (1939) 1 K.B. 687.

Crimes—Offences against the Person Act (1861), S. 58—Procuring miscarriage—Operation performed for preserving the life of the mother—When a good defence—Bona fides—*Burden of proof.*

If the accused doctor is of opinion on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother and the burden is on the Crown to prove that the doctor did not do the act in good faith for the purpose of preserving the life of the girl. The accused was acquitted.

REX *v.* WESTON-SUPER-MARE LICENSING JUSTICES. *Ex parte* POWELL, (1939) 1 K.B. 700.

Jurisdiction—Declining jurisdiction—If case heard and determined—Mandamus.

On an application for approval of alterations to licensed premises the justices declined jurisdiction in so far as the bulk of the alterations was to premises not already licensed. On appeal,

Held, the justices had jurisdiction provided the premises when altered will still be in the ambit of the licence. The justices cannot

be said to have heard and determined the case when they declined jurisdiction in the case. Writ of mandamus should be issued.

DIES AND ANOTHER *v.* BRITISH AND INTERNATIONAL MINING AND FINANCE CORPORATION, (1939) 1 K.B. 724.

Sale of goods—Part payment of purchase price and contract to make further payments within a time - Default of buyer in making further payments—No tender nor delivery of goods by seller—Right of buyer to return of the purchase price paid—Right of the seller to damages for the breach of contract—Quantum of damages—Loss of profits which seller would have made—If to be included.

Where there is a contract for the sale of goods, and a part payment for the goods is made, but no goods are delivered or tendered by reason of the default of the buyer the seller's only remedy is to recover damages for the default, while the buyer, notwithstanding that it is by reason of his default that the contract has not been performed, is entitled to recover the purchase price that he has paid, subject to the right of the seller to set off against that claim the damages to which he can establish his title. The true measure of damages which the seller is entitled to is the loss of net profit that the seller would have made on the deal.

HALL BROTHERS STEAMSHIP COMPANY, LTD. *v.* YOUNG, (1939) 1 K.B. 748.

Insurance—Marine insurance—Policy—Construction—"Liable to pay by way of damages"—If includes special liability imposed by French Law—"Damages"—Meaning of.

A policy of marine insurance contained the following clause: "If the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision........" the underwriter's liability will arise. The insured vessel was compelled under French Law to bear a particular charge in respect of damage suffered by its French pilot vessel.

Held, the very special liability imposed by French Law is not that which upon a true construction falls under the head of a sum which the assured became liable to pay by way of damages in respect of the collision. "Damages" refers to payments the obligation to make which arises from a fault of some kind on the part of the ship insured.

JOTTINGS AND CUTTINGS.

Professional Terminology.—Each calling, whether professional or other, possesses its own vocabulary of which it makes constant use, not infrequently with the result that those outside the particular calling are extremely puzzled. Indeed, it may sometimes be the case that the language used is quite unintelligible to the uninitiated. The professions which we call learned have in an especial degree a large collection of words which convey little or nothing to those not within the particular circle, a circumstance which is apt at times to provoke satirical comment. But ere we mock at the terminological vagaries, as outsiders are apt to call them, of one profession or calling we should do well to bear in mind the homely old maxim, "They who dwell in glass houses should refrain from throwing stones." To particularise, we lawyers are frequently moved to merriment by the almost overpowering technicalities, with their apparent terrific implications, employed by our medical confreres. Many readers will recall the classic instance of the young house surgeon who was called to give evidence at a trial before Baron Bramwell, a judge who was a very matter-of-fact person and liked other people to be the same, and who would always insist upon a spade being called a spade and not an agricultural implement. The prosecutor had been somewhat severely handled by the prisoner, and the house surgeon, being asked to describe the nature of the injuries, said: "I discovered considerable ecchymosis under the left orbit, caused by extravasation of blood beneath the cuticle." This sounded very dreadful, but the Baron was not so impressed with this account of the diagnosis, for he turned to the witness, and said: "I suppose you mean that the prosecutor had a black eye?" "Precisely, my Lord," answered the witness. "Perhaps," continued the judge, "if you had said so the jury would have better understood you." "Precisely, my Lord," said the witness, obviously delighted to find that the judge understood his meaning and accepting the rebuke as in fact a compliment. Jesting at the professional language of the medical profession is, however, not confined to our own country. In one of the novels of Henri Bordeaux occurs this relevant passage: *"Rien n'est plus long ni plus obscur qu'une deposition de medicin en justice. Ils n'ont pas leur pareil pour embrouiller ce qui est clair, par le moyen de mots techniques et savants."—L.T. 1939, p. 247.*

The Mote and the Beam.—While we are all quick at observing the mote in our medical brethren's eye, we have to remember the warning of Holy Writ about the beam that may be in our own "orbit", as the witness mentioned above called it; and, indeed, we

are forced to admit that in our legal terminology we have not a few words that, to say the least, are by no means easy of comprehension by what we may, without any invidious intent, call outsiders; that is, those who are not members of our Profession. Why, for example, the layman might ask, is a deed sometimes called an "assurance"? or why should some document begin with the words "Know all men by these presents" when that last word by no means necessarily denotes a gift that the grantor is making? If we continue in the territory of the conveyancer and do not, as a former member of that fraternity did, regard an abstract of title as "the finest achievement of human intelligence," we may meet with a goodly list of terms which are not such as he who runneth may read and understand. What is the ordinary man to make of a "base fee," a term which in its non-technical sense was at one time applied by disgruntled barristers' clerks to briefs on which there was nothing for themselves? Still keeping in the sphere of the conveyancer, why, it may be asked, should a house be termed a "messuage," or why should the subject of the transmission on sale of landed property, which the conveyancer calls real property, be treated under the rubric "vendor and purchaser", while the transmission of other property is dealt with under the heading "sale of goods"? It is easy to pose these questions, but, save on the explanation of deep-rooted custom, difficult to answer. Then there is that very amiable gentleman, innocent of all guile, who may be called upon to take the part of a "bare trustee"—an epithet against which he has just cause to recalcitrate. Take again an expression with which every lawyer is familiar, "fee simple," and regarding which the conveyancer might well think there was no room for dubiety, but according to Dean Beeching's Notes of an Examiner, the phrase was very far from being accounted as easy as might have been supposed. The "shots" made by the examinees included the following: "Cash down," "as easy as tipping," "simply a matter of money," "the small salary of the clergy," "quite simple," "a simple fee no bribes," "without any extra charge," but the gem of all was "a legal term for the conveying of entrails."—*L. T.*, *1939*, *p. 247*.

A Medical Critic.—Just as we poke fun, although quite good-naturedly, at the medical profession for their use of highly technical language not generally understood outside their own circle, so occasionally a medical man has ventured to criticise some of the terms employed in law. On one occasion a medical man sought to do this, but this time he, in the language of the old reporters, took nothing by his motion. "I never could comprehend," said the doctor to a barrister, "what you mean by docking an entail." "My

dear doctor," was the answer, "I don't wonder at that; it is doing what your profession never consent to—suffering a recovery."—*L.T., 1939, p. 247.*

The Morality of Advocacy.—Everyone knows how Boswell contrived to irritate his mentor by discussing every kind of subject, however absurd, that came into his mind. Among those topics which seemed to worry Boswell was that which has oftentimes been debated, namely, whether an advocate is justified in appearing for a client whose cause he feels is not supportable. Boswell quotes Sir William Forbes as saying that an honest lawyer should never undertake a cause which he was satisfied was not a just one. "Sir," began Johnson, "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is, that every man may have his cause fairly tried by men appointed to try causes.... If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim." On another occasion Boswell reverts to the question, but Johnson again was not to be easily put out by the supposed casuistical cross-examination of his future biographer, who was not really seeking as a good disciple for instruction, but was merely trying to draw him out on a question which has often engaged the attention of moralists, but which in fact has no substance in it. It is a little remarkable, however, that Johnson who, in many matters, was extremely strict in his views, took so sensible a view of the question. As he said, "You are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's decision."—*L. T., 1939, p. 263.*

Should Lawyers Solicit Employment?—This was another subject on which Boswell talked to Johnson with the object of ascertaining what he thought about it. In 1776, in a conversation between them, Boswell suggested a doubt of the justice of the general opinion that it was improper for a lawyer to solicit employment. A candidate for Parliament, Boswell pointed out, solicited votes, and if so why should not a member of the Bar solicit attorneys to send him briefs? Here again Johnson took up a sensible attitude by saying that it was wrong to stir law suits, although he went on to add that "when once it is certain that a law suit is to go on, there is nothing wrong in a lawyer's endeavouring that he shall

have the benefit rather than another." Pressing the subject further, Boswell asked whether he, Johnson, would solicit employment if he were a lawyer, and to this the doctor gave a delightful reply: "No, sir," said he, "but not because I should think it wrong, but because I should disdain it. However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked". It is believed that since Johnson's day the suggestion of "injecting" a little hint now and then has not been overlooked.—*L.T., 1939, p. 264.*

Advice to Boswell as an Advocate.—In the year 1778 Boswell, who, it is worth remembering, had a fair practice at the Bar in Scotland, was instructed to appear on behalf of the opponents of a Scottish road bill which was before the House of Commons. As in other matters, he thought proper to take counsel with Johnson how best to address such an audience. Johnson advised him to provide himself "with a good deal of extraneous matter, which you are to produce occasionally so as to fill up the time. . . . . When you catch a moment of attention press the merits of the question upon them." On the following day Boswell met Wilkes and mentioned to him the subject, and his advice was certainly amusing. "Be as impudent as you can," said he, "as merry as you can, and say whatever comes uppermost. Jack Lee is the best heard there of any counsel, and he is the most impudent dog, and always abusing us." To which of the two methods of approach on behalf of his clients Boswell was drawn we are unhappily left ignorant.—*L.T., 1939, p. 264.*

Johnson on Law Reports.—It might have been thought that Johnson would never trouble his head about law reports, but he appears to have been interested in them, as they were produced both in England and in Scotland. In the year 1773 he diverged from the subject of the Stuart family to the very different one of the comparative excellence of the reports of decisions in England and in Scotland. "The English reports, in general, are very poor" —readers will, of course, remember that this conversation took place nearly one hundred and fifty years ago—"only the half of what has been said is taken down; and of that half, much is mistaken. Whereas, in Scotland the arguments on each side are deliberately put in writing, to be considered by the court. I think a collection of your cases upon subjects of importance, with the opinions of the judges upon them, would be valuable." At that period the labours of the law reporters in Scotland were much lightened by the fact that the arguments were largely submitted in

writing, a practice which certainly had its advantages over the system in use in England where the arguments were orally presented to the court.—*L.T., 1939, p. 264.*

Mr. Speaker.—The Select Committee on Parliamentary Elections specially concerned with the Speaker's seat have made a report which was fully summarised in our newspapers. There is a great deal to be said on the question whether the Speaker should be a member of the House, elected as all other members are and distinguished from them only by his high qualities of ability and tact, or whether he should be an officer appointed by the Crown on the recommendation, of course, of Ministers, and hold office for a session or a fixed term of years. After full consideration the Committee conclude that things should remain as they are. Some people are fond of criticising the English Constitution, which is far from perfect; but we think they all agree that the way in which the Speaker is elected and the way in which he controls the House are models of what we may call dignified democracy such as cannot be found elsewhere. Of course, academic critics say that the Speaker must be, in some sense, a party man. He is chosen by the majority of a House of Commons which is divided into parties: and the maintenance of order and the suppression of irrelevance or tedious repetition should not (we are told) be in the hands of a party man, however fair he may be—or try to be. On the whole, the known facts fairly answer these academic critics. The fact that Mr. Speaker's constituents may want to say something violent which he cannot say for them is regarded by some people as a disadvantage. If it is, it is one which, in view of the other advantages of the system, we may well bear.—*L.J., 1939, p. 279.*

The Lord Chancellor.—Members of both branches of the legal profession hope that the rumours of Lord Maugham's desire to retire from the Woolsack are unfounded. He has in their opinion shone with effulgence unusual even for the luminous occupants of that highest of judicial places; and while the candidates for a vacancy are always good and willing, there is none better than the reigning L.C.

This troubled century is little more than 38 years old; and yet we have had no less than ten Lord Chancellors and the threat or promise of yet another in the year 1939. Lord Maugham no doubt feels that he is entitled to a period of leisure and comparative repose; and he has certainly earned it after a long, arduous and successful career at the Chancery Bar, on the Bench, and now since

the time when Lord Hailsham retired last year, on the reconstituted Woolsack.—*L.J., 1939, p. 289.*

The Derivation of L.Cs.—"It is difficult," wrote one who had studied the great subject with care, "to form any precise estimate of the surroundings which are essential for the production of a Lord Chancellor. Statistics are ever fallacious and calculations based upon averages are apt to deceive"; but he came to the conclusion that "a minister of religion is more likely to become the proud and happy father of the noblest of all officials than any other type of professional man."

This conclusion was based on the facts of the nineteenth century. During that time two rectors of the Church of England, a Scottish minister and a Dissenting preacher had severally seen their sons seated upon the Woolsack. Four legal parents—but of a mixed kind and not assignable to one species—had a similar joy. These were a Scottish advocate, a Master in Chancery, a solicitor and a barrister-at-law. One peer, one barber, one doctor and one soldier had been similarly blessed. The list of distinguished progenitors consisted of 17 names, from which it was "incidentally deducible that the average career of a Lord Chancellor is of some five years' duration."—*L.J., 1939, p. 289.*

In the Nineteenth Century.—In the first year of the nineteenth century Alexander Wedderburn, Baron Loughborough and Earl of Rosslyn, reigned as Chancellor. His father was Peter Wedderburn, advocate, of Edinburgh. To him succeeded John Scott, Earl of Eldon, whose father was successively a coal-fitter, proprietor of a public-house, and a shipowner in a small way. Thomas Erskine, who followed, was the son of Henry David, tenth Earl of Buchan—a Scottish Peer. John Singleton Copley, Lord Lyndhurst, was the son of an American portrait painter. The father of Henry Brougham, Lord Brougham and Vaux, was a small North-country landowner.

Charles Christopher Pepys, Earl of Cottenham, was the son of Sir William Weller Pepys, Bart., a Master in Chancery; Thomas Wilde, Lord Truro, of an attorney-at-law, and Edward Burtenshaw Sugden, Lord St. Leonards, of a hair-dresser and barber. The father of Robert Monsey Rolfe, Lord Cranworth, was a Norfolk rector: Charles Thesiger, collector of Customs in the island of St. Vincent, was the father of the first Lord Chelmsford. Lord Campbell was the son of the Rev. Dr. George Campbell, minister of Cupar in the county of Fife; Richard Bethell, Lord Westbury, of a Bristol doctor; Hugh McCalmont Cairns, Earl Cairns, of a

Captain in the 47th Regiment of Foot; William Page Wood, Lord Hatherley, of Sir Matthew Wood, Alderman, Sheriff, and Lord Mayor of London.—*L.J., 1939, p. 289.*

—*And in this.*—Roundell Palmer, Lord Selborne, was the son the rector of Mixbury and Finmere, in the county of Oxford; Farrer, Lord Herschell, of the Rev. Haim Herschell, a Dissenting minister, who first saw light in Prussian Poland; and Hardinge Stanley Giffard, Earl of Halsbury, was the third son of Mr. Stanley Lees Giffard, LL.D., barrister-at-law and journalist.

Lord Halsbury saw our country and its laws safely into the twentieth century; his final retirement was in 1905. Robert Threshie Reid, Lord Loreburn, who succeeded him, was the son of a barrister, sometime C.J. of the Protectorate of the Ionian Isles. Lord Haldane's father was a Writer to the Signet; Lord Buckmaster's, a schoolmaster; Viscount Finlay was eldest of a doctor's large family of eleven; a barrister was the father of the Earl of Birkenhead; a city merchant of Lord Cave; Viscount Sankey of Moreton, is son of the late Mr. Thomas Sankey of that place; Quintin Hogg, philanthropist and father of Lord Hailsham, was a sugar merchant in a large and successful way; while Lord Maugham's father was legal adviser to the British Embassy in Paris.

On twentieth century statistics it would appear, therefore, that a lawyer is now more likely than a clergyman to become the parent of the holder of the Law's most glittering prize.—*L.J., 1939, p. 289.*

Lawyers and the Table.—If the biographers and critics of the old judges and practitioners speak truly, these worthies seem to have kept well in mind that verse from Ecclesiasticus which runs thus: "A cheerful and good heart will have a care of his meat and drink," a saying which in the mouth of our friend Dr. Johnson became somewhat coarsely translated into: "I look upon it that he who does not mind his belly will hardly mind anything else." How, then, does the matter stand with our great men of the past in the law? We read that Chief Justice Lee, who died in 1754, gained immense credit for an adequate knowledge of law by the sumptuousness and the frequency of the dinners with which he regaled his judicial brethren and those others whom he invited to his house. Of Thurlow it is said that he entertained "a somewhat too limited circle of friends with English fare and a superabundance of choice port." It is added that he was very particular about his fruit, few things angering him more than to

find inferior grapes or peaches placed before him. So irritated was he if this should happen that we are told that on one occasion when at Brighton, to the astonishment of the other guests, he threw the whole of a very fine dessert out of the window upon the Marine Parade. Of Baron Graham, who was appointed to the Bench of the Court of Exchequer in 1800, and whose universal urbanity and politeness were so marked that, as Jekyll humorously put it, "No one but his sempstress could ruffle him," we read, *apropos* the subject under consideration, that his particular weakness was for oysters, eaten as a preparatory whet to the appetite for dinner. It is said that on one occasion when he had been indulging in this preprandial exercise, he observed in his genial way that "oysters taken before dinner are said to sharpen the appetite, but I have just consumed half-a-barrel of fine natives, and, speaking honestly, I am bound to say that I don't feel quite so hungry as when I began" —a phenomenon not altogether unfamiliar even to the ordinary person.—*L.T., 1939, p. 291.*

Lord Ellenborough and Lord Eldon.—Just as quite ordinary mortals have their culinary preferences, so, too, it seems had our former Chief Justices and Lord Chancellors. Of Lord Ellenborough we read that his particular "wanity," as Sam Weller would have expressed it, was lobster sauce, and we are further told that on one occasion he was enabled to show from the judgment seat his regard for this delicacy. This was when he decided that those engaged in the lobster fishery were exempt from legal liability to impressment. "Is not," he asked, in the course of giving judgment, "the lobster fishery a fishery, and a most important fishery, of this kingdom, though carried on in shallow waters? The framers of the law well knew that the produce of the deep sea, without the produce of the shallow water, would be of comparatively small value, and intended that turbot, when placed upon our tables, should be flanked by good lobster sauce." Lord Eldon was equally fond of the table, but in his case there was a difference in taste very marked and, as some thought, somewhat derogatory to the exalted position which he occupied. His passion was liver and bacon. Being invited to dinner by Sir John Leach, Master of the Rolls, Lord Eldon replied as follows: "It will give me great pleasure to dine with you, and since you are good enough to ask me to order a dish that shall test your new chef's powers—I wish you'd tell your Frenchman to fry some liver and bacon for me." Sir John did not like this, and said: "Are you laughing at me or my cook?" thinking that the Chancellor was bent on ridiculing his luxurious mode of living. "At neither," answered the Chancellor,

with equal simplicity and truth; "I was only ordering the dish which I enjoy beyond all others."—*L.T., 1939, p. 291.*

Lord Stowell.—Lord Stowell, the brother of Lord Eldon, we associate chiefly with the exalted place he attained in admiralty and prize law, but he has other claims to remembrance. For example, to him we owe two classic phrases—one, "The elegant simplicity of the three per cents.," and the other, more germane to the subject now before us, "A dinner lubricates business." Like Eldon, he loved port, and in this connection the story has come down to us of the practice of the two brothers to dine together on the first day of term at a tavern in the neighbourhood of the Temple. In his old age Stowell was recalling these dinners to his son-in-law, Lord Sidmouth, when the latter observed, "You drank some wine together, I daresay." Stowell admitted that they did. Following up his previous question the son-in-law inquired, "Two bottles?" "More than that," was the reply. "What! three bottles?" again asked Lord Sidmouth, to which the answer was again, "More than that." This made the son-in-law open his eyes with astonishment. "By Jove, sir, you don't mean to say that you took four bottles?" By this time the old man was beginning to feel somewhat shamefaced, but he only said, "More; I mean to say we had more. Now don't ask any more questions!" It will not be forgotten by those who know their Boswell that Stowell got into trouble with Blackstone's family for telling Boswell that Blackstone, "a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work, by a temperate use of it." We are told that Stowell felt compelled to write to Blackstone's family to apologise for Boswell's anecdote, which, however, remains to this day in the great biography.—*L.T., 1939, p. 292.*

Thackeray's Testimony.—Every lawyer who has read Thackeray's classic, Pendennis, will recall the chapter entitled "The Knights of the Temple," wherein the hero is introduced to that part of the Bar student's curriculum which he enjoys much more than the subsequent interrogatories as to his professional knowledge, namely, the ancient practice of dining together. In the first evening when Pen dined in the hall of what is termed "the ancient and liberal Inn of the Upper Temple," he is seated next Lowton, a student of older standing by whom he is informed of the names of those seated at the high table. "There's Boosey, the bencher, the bald one sitting under the picture and 'aving soup; I wonder whether its turtle? They often 'ave turtle. Next is Balls, the

King's Counsel . . . That's oldGrump, the seni or of the Bar; they say he's dined here forty years. They often send 'em down their fish from the benchers to the senior table," and so on in that delectable style of which the author was a past-master. Thackeray himself liked a good dinner, and he knew how to set forth its attractions in his own inimitable fashion. At one time it is understood the dining in hall during term was the only essential for call to the English Bar. Those halcyon days are gone, but, happily, the dining is still insisted upon by the Benchers, and few there are who would recalcitrate against its maintenance. Long may it continue to form one of the necessary steps to the acquisition of the honourable status of a barrister.—*L.T., 1939, p. 292.*

Died at His Post.—Mr. Justice Stephen, of the New South Wales Supreme Court, who died suddenly at Sydney at the close of his summing-up in a libel action, has just added one more to the number of judges who have been struck down by death at their posts. It was while presiding in the House of Lords in place of Lord Eldon that Lord Alvanley, C.J., was seized with a malady which carried him off in three days. Lord Tenterden, C.J., was overtaken by his last illness while presiding at the great trial of the Mayor of Bristol. From his deathbed he continued to follow the course of the proceedings and in his last moments he seemed to fancy himself addressing a jury. Mr. Justice Hayes was stricken suddenly while unrobing after sitting in court at Westminster. Old Mr. Justice Manisty, another Victorian judge, worked on till he collapsed in court. The handwriting in his notebook up till the very last stroke was as delicate and distinct as if there remained to him years instead of hours of life. The death of Mr. Justice Talfourd while charging the grand jury at Stafford has been stamped on the memory of the legal profession by Lord Darling's descriptive poem. Only four years later a similar scene was enacted at Welshpool when Mr. Baron Watson was seized with apoplexy, dying on the morrow.—*S.J., 1939, p. 354.*

Fire Engines and Speed Limits.—Three classes of vehicles are exempt from the statutory speed limits which apply to so many others. They are the vehicles of fire brigades, police officers and ambulances. The exemption is not absolute, but only operates if, in the opinion of the magistrates, observance of the limit would be likely to hinder the use of the vehicle for its essential purpose on the occasion on which contravention of the law is alleged. This is, however, the only, or almost the only, concession given to these vehicles. For instance, they must respect traffic signs and may be held negligent if they disregard the red light's prohibition (*Ward*

v. *L.C.C.*, 1938, 1 All. E. R. 341). And, we suggest, the fact that these vehicles are free of speed limit when out on service is by no means conclusive if the charge be one of reckless or of careless driving. The point came up in the Sheriff's Court at Edinburgh this week (*Times*, May 16). The Sheriff was trying charges of reckless and, alternatively, of careless driving by a fireman which followed a fatal accident in the streets of Edinburgh. The learned Sheriff looked at the Act, observed the privilege, and found that the speed was not excessive. This may well be so: but we should doubt whether that fact is a good defence to a charge of reckless driving. Speed is only an ingredient in manner. There was, however, other evidence in answer to the charge made. All we wish to submit is that though a person is free of limits he may drive recklessly.—*L.J., 1939, p. 352.*

Children in the Streets.—The question of the rights and wrongs of children playing in the streets has always been important: and the recent rules about damages for the dead have added to its importance. Mr. Justice Hallett remarked on the matter during a case on circuit lately (*Times*, April 27), when he awarded a considerable sum to a bereaved father. His little son, who was killed by a local authority's vehicle, was four years old. Was he old enough to be capable of contributory negligence? The learned Judge said, according to the report, that the law did not recognise contributory negligence by children. If the report is correct, this was (if we may say so) giving too great a liberty to youth. A little child of three and a half years cannot be guilty of contributory negligence (*Gardner* v. *Grace*, 1 F. & F. 359), but a child of six may be so (*Fraser* v. *Edinburgh Tramways*, 20 Sch. R. 192). As a child grows older the Courts impute to him or her such a duty to know, see and take care as may reasonably be expected of a boy or girl of his or her age. Though always generous to children, the Courts have not gone so far as the learned Judge's observation suggests. However, he was dealing with a child of four; and what he said was correct for the case in hand. The law is well stated and the cases collected in *Halsbury, Hailsham edn.*, vol. 23, pp. 688-9. —*L.J., 1939, p. 353.*

BOOK REVIEWS.

THE LAW OF COPYRIGHT IN INDIA, by Harish Chandra Mital, B.A. (Hons.), LL.B., Punjab Civil Service (Judl.) and Bhagwan Das Jain, M.A., LL.B., Vakil, Delhi. Published by Eastern Law House, Calcutta. Price Rs. 10.

We have great pleasure in welcoming this book which so far as we are aware is the first Indian book on the subject of Copy-

right. There are leading text books on the subject in England and as the Imperial Copyright Act of 1911 applies to the whole of the British Dominions, the English treatises on the subject are of valuable authority in this country as well. There is however the Indian Copyright Act of 1914 which in some respects modifies and adds to the provisions of the Imperial Copyright Act. The learned authors have commented on both the enactments and have largely drawn from the English text books and decisions which will be found to be of great use. The subject being one with which the general practitioner may not be very familiar, this book of the authors will be greatly appreciated as a guide to the subject. There is a recent important decision of the House of Lords in *Caxton Publishing Company, Limited* v. *Sutherland Publishing Company,* (1939) A. C. 178, under Ss. 6, 7, 10 and 35 of the Imperial Copyright Act dealing with questions whether an action for conversion under S. 7 is an alternative or a cumulative remedy to an action for refringement under S. 6 of the Act. The decision also deals with the question whether S. 10 of the Act which prescribes a period of three years for an action for infringement of copyright applies also to an action for conversion under S. 7. The learned authors have expressed the opinion that it is doubtful whether the three years rule of limitation applies to an action under S. 7. The House of Lords in the above case have held that the rule of limitation applies equally to actions for conversions under S. 7. Their Lordships have also discussed the measure of damages for conversion in cases where a portion of the work has been incorporated in another work. This decision was given as early as November, 1938 and reported in (1938) W.N. 367 and 108 L.J. Ch. 5, though it is reported in the English Law Reports only in (1939) A.C. 178. As there is no index of cases in the book under review, we are not in a position to say whether this decision was available to the learned authors at the time when the book went to print.

THE INDIAN LIMITATION ACT (1908), by V. V. Chitaley, B.A., LL.B., Senior Advocate, Federal Court and Editor, All India Reporter, and K. N. Annaji Rao, B.A., B.L., Advocate, High Court, Madras. (Volume 3). Published by All India Reporter, Ltd., Nagpur. Rs. 30 per set.

We had occasion to review the first two volumes of this work which brought the commentaries on the Act down to the end of article 140 of the first schedule of the Limitation Act. The present volume completes the work and contains a copious general index of the subjects dealt with in all the volumes. There is an

appendix which gives the Punjab Limitation (Custom) Act I of 1920. There is however no index of cases referred to which we hoped would be at least introduced in this work of the authors. A general index of cases would have enhanced the value of the work where hundreds of cases have been cited and referred to in the body of the book. We hope that the work will meet with the popularity it deserves.

HIRE-PURCHASE, by Vidya Sagar, M.A., LL.B., Pleader, Delhi and C. L. Varma, B.A., LL.B. Published by Lawyer Brothers, Delhi. Price Rs. 4.

We are not aware of any Indian text book on the special branch of the law relating to hire-purchase agreements and we are glad that the learned authors have brought out a book on the subject which has become one of increasing interest in commercial transactions in this country, of late. The incidents of hire-purchase agreements and outright sales have to be distinctly kept in view. The learned authors have in the various chapters dealt with the subject in all its aspects and also the points arising out of the topics allied to the subject such as Bankruptcy, Insurance, Motor Vehicles Act and Rules. The appendix giving the forms of hire-purchase agreements will be found of practical utility. The statutory provisions having a bearing upon the subject are given in another appendix. We have every hope that the book will be found useful by lawyers and businessmen.

THE INDIAN INCOME-TAX ACT (XI OF 1922) (as amended up to date), by N. S. Raghavan, B.A., B.L., Advocate, High Court, Madras. Published by V. S. N. Chari & Co., Madras. Price Rs. 3.

The Income-tax Act which was complicated even as it stood before, has been made more difficult to understand by the laymen and businessmen, if not also by lawyers, by the recent amendments. A handy commentary of the Act with explanatory notes, like the book under review, will therefore be found useful to the assessees and lawyers and judges. The introduction which gives a connected view of the Income-tax Law in a short compass will make the subject intelligible to a lay-reader. We welcome the book under review which will be found useful for a clear understanding of the enactment.

THE
MADRAS LAW JOURNAL.

II] AUGUST [1939

CAN A MAINTENANCE ORDER UNDER S. 488, CRIMINAL PROCEDURE CODE, BE CANCELLED WHEN REUNION OF THE PARTIES TAKES PLACE?

The Criminal Procedure Code, as it now stands, does not provide for the cancellation of a maintenance order in many of the possible contingencies that may crop up during the life of a quarrelling couple. Whether such an order could be cancelled at all and what exactly the Court's powers are under S. 489, cl. 1 of the Criminal Procedure Code when the wife returns and lives with the husband, have come up for judicial determination in several cases and there is a remarkable conflict of opinion on the matter. Though the problem appears to be simple in its form, yet, Courts have entertained two sets of views on the matter. In view of the wording of S. 489, cl. (1) itself, one has to come to the conclusion that the legislature did not contemplate such possibilities on the part of the married couples. when once they quarrelled. After the passing of a maintenance order in favour of a wife, the same can be cancelled under two sets of circumstances:

(1) if the wife lives in adultery, etc., as in S. 488, cl. 5 and

(2) if a decree of a competent Civil Court comes into existence as in S. 489, cl. 2.

But courts not content with these provisions have tried to extend their jurisdiction in this direction by seeking to apply S. 489, cl. 1 of the Criminal Procedure Code to cases of reunion and hence the question regarding the Court's powers to cancel such a maintenance order under S. 489, cl. 1 arises.

2. The provision of the statute as embodied in S. 489, cl. 1 is as follows:—

"On proof of a change in the circumstance of any person receiving

under S. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance the monthly rate of 100 rupees in the whole be not exceeded."

In this connection we must note that the dictionary meaning as found in Webster (Ed. 1916,) p. 64 of the word "alter" is as follows:—

(1) To change in one or more respects but without destruction of the identity of the thing changed.

(2) To make a thing different without changing it to something else. It also appears therefore that the change mentioned in S. 489, cl. 1 relates to the change in the pecuniary circumstances of the parties and not to the change in their status. Further, this section preceded by the word wife or child and followed by the limitation as to the amount of maintenance that can be awarded, is clearly indicative of the above view. (*See* In the matter of *Din Muhammad*[1] and *Shah Abu Ilyas* v. *Ulfat Bibi*[2].)

3. If the above deduction is correct, it is submitted that the decision in *Meenatchi Ammal* v. *Karuppuana Pillai* alias *Muthuswami Pillai*[3], where it has been held that the word 'alteration' in cl. (1) of S. 489, Criminal Procedure Code, includes cancellation as well and therefore the maintenance order can be reduced to nothing also under this clause of S. 489, requires reconsideration. There the question arose whether a female child who had got a maintenance order in her favour was to lose the same when she got married and His Lordship held that she lost the same if her husband was found to be able to maintain her.

4. In this connection the case reported in *U Po Shein* v. *Ma Sein Mya*[4], may also be noted where it is held in a case of reunion after a maintenance order, that the Court has got jurisdiction to cancel the same. But the reasoning is different from that in *Meenatchi Ammal* v. *Karuppana Pillai* alias *Muthuswami Pillai*[3]. His Lordship in the Rangoon case observes in p. 462 thus:

"The provisions of S. 489 (1) would appear not to apply to a case like the present. At the same time it would appear unreasonable that a wife,

1. (1882) I.L.R. 5 All. 226. 2. (1896) I.L.R. 19 All. 50 (F.B.).
3. (1924) 48 M.L.J. 183: I.L.R 48 Mad. 503.
4. (1930) I L.R 8 Rang. 460.

once she has succeeded in obtaining an order under S. 488, Criminal Procedure Code, should be able permanently to hold this order *in terrorem* over her husband after a *bona fide* reunion. I would venture to say that the continuance of such a state of affairs would not assist the happiness of such a reunion. Since the original order of the Magistrate is conditional on neglect or refusal by the husband to maintain the wife a *bona fide* reunion must be interpreted as removing the basis on which the order of the Magistrate rests and as therefore vacating the order. . . . . If there was subsequent desertion by the husband it was open to the wife to make a fresh application under S. 488, Cr. P. Code."

Hence His Lordship is of the opinion that the Court should cancel the order of maintenance if there is a *bona fide* reunion.

5. The contrary view taken in *Kanagammal* v. *Pandara Nadar*[1], *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[2], *Narayanaswami Mudali* v. *Mangayarkarasiammal*[3], *Mt. Zauhra Bi* v. *Muhammad Yusaf*[4] and *John P.E. Coelho* v. *Mrs. Blanche Coelho*[5] *Pearey Lal* v. *Mt. Naraini*[6] is based on what appears to be, with respect, the more logical and common sense view of S. 489, cl. (1), namely, that the maintenance order cannot be cancelled under this section—S. 489, cl. (1). His Lordship Curgenven, J., observes in *Kanagammal* v. *Pandara Nadar*[7] that the mere fact that a wife has returned to live with her husband will not have the effect of cancelling the previous order and the Code makes no provision for the cancellation of the order upon such an event occurring, and hence held that a temporary reunion between the husband and his wife had no effect of bringing the old order to an end automatically and the wife is still entitled to claim maintenance in spite of the temporary reunion. The said Judge has affirmed his own view in *Kanagammal* v. *Pandara Nadar*[7] in a later case in *Narayanaswami Mudaliar* v. *Mangayarkarasiammal*[8]. It is not clear whether the decision in *Meenatchi Ammal* v. *Karuppana Pillai* alias *Muthuswami Pillai*[9] was brought to the notice of the learned Judge in *Kanagammal* v. *Pandara Nadar*[7].

6. There is yet another view taken in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[2]. This decision is very

1. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663.
2. (1923) 37 C.L.J. 180: 75 I.C. 529.
3. A.I.R. 1927 Mad. 1148.
4. A.I.R. 1930 Lah. 1043.
5. A.I.R. 1936 Nag. 228.
6. (1935) A.I.R. 1935 All 977.
7. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663 at 664.
8. A.I.R. 1927 Mad. 1148.
9. (1924) 48 M.L.J. 183: I.L.R. 48 Mad. 503.

instructive and is relied on by His Lordship Mr. Justice Curgenven in *Kanagammal* v. *Pandara Nadar*[1]. In that case their Lordships Sanderson and Panton, JJ., of the Calcutta High Court, observe that a mere temporary stay of this kind though it may have the effect of suspending the operation of the maintenance order, yet had not the effect of cancelling it in the way in which it could be cancelled under S. 488, cl. 5.

7. The above cases deal with a wife who temporarily returns to her husband, lives with him and then wants to enforce the old order for maintenance. In one case she bore a child to the husband and then went away. (See *Narayanaswami Mudali* v. *Mangayarkarasiammal*[2]) But where a wife permanently returns to the husband, what is to become of the previous maintenance order? Looked at from that point of view, the sections of the Criminal Procedure are not wide enough to provide for such a possibility. If at all the defect is to be remedied it can be done only by the legislature. The observation of Curgenven, J., in *Kanagammal* v. *Pandara Nadar*[1] is pertinent and covers this possibility also to a certain limited extent. The learned Judge observes that if a wife returns to live with her husband, it would be open to the Court to decline to enforce the order, under S. 490, whether or not it would have the power in the absence of any statutory provision to cancel it.

8. It is high time that the legislature seeks to settle this matter once for all by enacting a provision giving legislative sanction for the suspension of the maintenance order so long as the parties remain reunited and the revival, as pointed out by the learned Judges of the Calcutta High Court in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[3], of the order as soon as they fall out once again. Therefore it is suggested that the language in S. 489, cl. 1 should be so altered as to cover the above cases.

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Advocate, Madras.

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1. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663 at 664.
2. A.I.R 1927 Mad. 1148.
3. (1923) 37 C.L.J. 180: 75 I.C. 529.

SUMMARY OF ENGLISH CASES.

NOBLE LOWNDES AND PARTNERS *v.* HADFIELDS, LTD., (1939) 1 Ch. 569.

Practice—Action commenced in the name of a firm—Objection that firm not registered and so not entitled to sue—Application by the person who entered into contract to amend the plaint and to be substituted as the plaintiff—When to be allowed.

An action was commenced by *L* in the name of a firm of five persons, in the honest belief that he was entitled to sue in the firm name. Defendants in the course of the proceedings discovered that the firm was not registered and not entitled to sue. *L* then sought by a summons to be substituted as sole plaintiff and the defendants took out a summons to strike out the statement of claim.

Held, an action by or against a firm notwithstanding R.S.C. O 43-A, remains an action by or against the individual members of the firm and what is asked for not being substitution of a living person for a non-existent entity but merely for striking out the names of all the plaintiffs except one and to leave that one as sole plaintiff, the amendment must be allowed, but as the mistake was plaintiffs the costs of the action up to date and of the summons must be paid by him.

In re: FARMER: NIGHTINGALE *v.* WHYBROW, (1939) 1 Ch. 573.

Will—Legacies and annuities—Abatement—How to be effected—Rights of annuitants and residuary legatee.

Where an estate was insufficient to pay the legacies and annuity in full and there had to be an abatement the question arose as to how the abatement was to be effected in relation to the annuity having regard to the direction to set aside a sum, the income of which should be sufficient to meet it, with a gift over of the sum so set aside.

Held, the annuitant is entitled to have paid over to her the capital value of her annuity, when abated, if necessary. If after payment of the legacies and the actuarial value of the annuity in full any surplus remained, that surplus was payable to the beneficiaries who were to take the annuity found on the death of the annuitant. The surplus was not payable to the residuary legatee.

In re COLIN COOPER: LE NEVEFOSTER *v.* NATIONAL PROVINCIAL BANK, (1939) 1 Ch. 580.

Wills—Legacy to trustees on secret trusts—Whether trust or testamentary disposition—Essentials of valid trust.

The testator made a will on 13th July, 1931. On 10th February, 1938, he made another will revoking the earlier one and by a clause bequeathed to his executors £5,000, upon trusts which he had already communicated to them. Shortly after, the testator, while in Africa on a shooting expedition, was taken ill and brought down to a hospital in Kenya where on 27th March, 1938, he made a will cancelling the will of 10th February, 1938, and reviving the will of 13th July, 1931, except as to the sum of £5,000 bequeathed to trustees which was increased to £10,000, they knowing the testator's wishes. On 29th March the testator died, and the question arose whether the gift of the additional sum of £5,000 for the secret trust was valid.

Held, the main principle which is laid down is that communication of the purpose for which the legacy is given to the legatee and acquiescence by the legatee in that purpose or promise on his part to carry it out are the essential matters which render valid a legacy for a secret trust [*Blackwell* v. *Blackwell*, (1929) A.C. 318, followed]. It is a matter of trust and not testamentary disposition. As the bequest of the second £5,000 was not communicated and accepted by the trustees it falls back into the residue.

WALLINGTON *v.* TOWNSEND, (1939) 1 Ch. 588.

Contract for sale of land—Vendor's default not due to defect in title—Purchaser's right to damages—Nature and extent.

Where the vendor's failure to carry out the contract is not due to a defect in vendor's title, the damages are at large and the Court can give such damages as according to general principles it thinks right. When there was no evidence that the property was worth more than the purchase price the purchaser is entitled to return of his deposit with interest at 4 per cent. by way of damages in respect of the loss of the use of the deposit, damages in respect of the costs of approving and executing the contract, and damages in respect of the costs of investigating the title and preparing the conveyance and searches.

In re A DEBTOR, (1939) 1 Ch. 594.

Bankruptcy Act, (1914), *S.* 130 (2) *and Bankruptcy Rules* (1915) *r.* 303—*Administration of a deceased insolvent's estate—If can be ordered before a legal personal representative of the deceased debtor has been appointed.*

Until a legal personal representative has been constituted the Court has no power to make an order for the administration in bankruptcy of a deceased debtor's estate.

LAYCOCK *v.* FREEMAN HARDY AND WILLS, (1939) 2 K.B. 1.

Income-tax Act (1915), *Schedule D, Cases I and II, rule* 11, *sub-rule* (2)—*Acquisition of wholesale subsidiary companies by holding companies—Acquiring company selling the goods direct to public—If company succeeded to the wholesale business.*

A retail boot and shoe business was carried on by the respondent company who also owned the whole of the capital of two subsidiary wholesale manufacturing companies whose whole output they purchased. On a voluntary liquidation of the two subsidiary companies the business was assigned to the respondent company and goods manufactured by them were sold direct to the public from respondent company's shops.

Held, the wholesale business of the subsidiary companies ceased and the respondent company did not succeed to the wholesale business under the Income-tax Act, 1918.

MAHON *v.* OSBORNE, (1939) 2 K.B 14.

Negligence—Surgeon and patient—Swab left in patient on operation—Res ipsa loquitur—*If applicable—Degree of care required.*

In an action by the mother of a deceased patient against the surgeon and staff for damages for negligence in leaving a swab in the patient which necessitated a second operation which resulted in death, the plaintiff contended that the doctrine of *res ipsa loquitur* was applicable.

Held, a decision of actionable want of care cannot be justly reached without taking due account of all the circumstances of the particular operation and the legal standard of care cannot be set higher than that of the ordinarily good and careful practitioner in those circumstances and whether or not there was failure to exercise such skill and care must depend on the evidence in the particular case.

Per *Mackinnon and Goddard, L.JJ.*, (*Scott, L.J.*, dissenting) the doctrine of *res ipsa loquitur* applied and the burden of proof was on the defendants.

Per *Scott and MacKinnon, L.JJ.*, (*Goddard, L.J.*; dissenting).—There was no general rule of law requiring a surgeon after an operation to make sure that no swab was left in the patient.

[Allowing newspaper reports of cases to be cited criticised.]

UNITED AUSTRALIA, LTD. *v.* BARCLAYS BANK, LTD., (1939) 2 K.B. 53.

Election—Commencement of action based on contract—Waiver of tort—Subsequent action on same facts based on tort against third party—If barred.

In November, 1934, certain debtors sent to the plaintiff company an order cheque for £1,900. *E*, the Secretary of the plaintiff company, without authority, endorsed it, in the name of the plaintiff company, in favour of M. F. G. Company. M. F. G. paid the cheque to their bankers, the defendants who collected the money. It was a simple case of conversion by *E* and M. F. G., and if the matter stood there not only M. F. G. but also the defendants would be liable in conversion for the amount of the cheque. On May, 13, 1935, plaintiffs issued a writ against M. F. G. for the £1,900 as money lent or as money had and received to the plaintiff's use. M. F. G. went into liquidation and a proof by the plaintiff for the amount was not admitted as the funds available were non-existent or trivial in amount. On November, 8, 1937, the plaintiffs began the present action against the defendant claiming £1,900 as damages for conversion of the cheque.

Held, the election to institute the proceedings against M. F. G. for money had and received waiving the tort prevents the plaintiff from reviving the claim in tort so as to pursue the remedy in tort against the defendant bank.

NATIONAL REAL ESTATE AND FINANCE CO., LTD. *v.* HASSAN, (1939) 2 K.B. 61.

Practice—R. S. C., O. 25, r. 2—Preliminary issue—Point of law—Hearing and disposal before trial—Proper procedure.

Where advantage is sought to be taken of the procedure for hearing and disposal of a "point of law" before the trial, care should be taken that a real point of law is being raised and there should be a clear definition of what the point of law raised is, and it is only in those circumstances that the Court can properly deal with the matter and that the procedure under R. S. C., O. 25, r. 2 is any advantage whatsoever.

WHITHAM *v.* BULLOCK, (1939) 2 K.B. 81.

Lease—One assignee of part of a lease forced under stress of liability to distress to pay the rent payable by the assignee of another portion—Right to recoupment.

The defendant an assignee of a portion of leasehold property refused to pay rent as the plot assigned to him had been cleared under the Housing Acts. The plaintiff, to whom the other portion had passed by assignment was forced to pay the rent for the whole property under threat of distraint by the lessor. The plaintiffs then claimed to be re-imbursed the defendant's share of the rent so paid.

Held, though the plaintiffs were not liable to be sued for the rent due by the defendant, the plaintiffs were entitled to sue defen-

dants for reimbursement of the defendant's portion of the rent paid under stress of liability to distress.

REX *v.* MILLS, (1939) 2 K.B. 90.

Criminal trial—Jury—Acquiescing of minority in majority verdict—Validity of verdict.

In an appeal against conviction on the ground that the recorder instructed the jury that he could not release them until they had reached a verdict.

Held, it is of the greatest importance indeed it is fundamental that jury should not be led either by a desire to acquiesce or to avoid eccentricity, or to save time and trouble to represent themselves as holding an opinion which they do not in fact hold and the conviction must be quashed.

PAGET *v.* MAYO, (1939) 2 K.B. 94.

Road Traffic Act (1930), *S.* 22*—Accident causing damage to stone wall and the vehicle itself—Failure of driver to report to police—If offence.*

S. 22 of the Road Traffic Act requires the driver of a vehicle to report to the police, "If in any case owing to the presence of a motor vehicle on a road an accident occurs whereby damage or injury is caused to any person, vehicle or animal." The information preferred against the respondent alleged that he failed to report an accident by reason of which a stone wall and the vehicle itself which caused the damage were injured. The contention on behalf of the respondent that the damage was not to any person, vehicle or animal within the meaning of S. 22 was upheld.

REX *v.* THE RECORDER OF BOLTON: *Ex parte* MCVITTIE, (1939) 2 K.B. 98.

Public Health Act (1936), *S.* 58*—Order to execute works of repair or restoration—Specification of works if essential for validity of order.*

Under the Public Health Act, 1936, S. 58, the owner of certain structures was ordered by the justices for the County Borough to execute such works of repair or restoration or if he so elected to demolish the structure and remove the rubbish as may be necessary for remedying the cause of the complaint. The order was confirmed by the quarter sessions. On an order *nisi* for a writ of *certiorari* for quashing the order it was argued that the order was bad as it did not specify the works of restoration or repair.

Held, S. 58 did not require specifications of the works to be given and the order was valid.

MORSE *v.* MUIR, (1939) 2 K.B. 106.

Practice—Order for payment of costs of divorce proceedings —Subsequent order for payment by monthly instalments—Fresh action in King's Bench for interest on the costs—If maintainable.

In divorce proceedings there was an order for payment of £1,478 18*s.* 11*d.* to the petitioner who then took proceedings by way of judgment summons and obtained an order for payment of the amounts by instalments at the rate of 10*l* per month and after the whole amount had been paid commenced proceedings in the King's Bench Division for interest on the original amount.

Held, the original judgment debt is gone and for that has been substituted a debt payable by instalments of 10*l.*, a month and as the original judgment is gone he cannot recover interest on it.

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS, S.A., (1939) 2 K.B. 117.

Shipping—Charterparty for two consecutive voyages—If two severable or one indivisible voyage—Deviation in the first voyage —Effect on contract.

By a charterparty dated December 30, 1937, the "Yolanda" was chartered and the charter was to be in force for two consecutive voyages. It was found that in the first voyage there was deviation and it was contended by the charterers that the contract came to an end.

Held, the true analogy to apply to the case is not the analogy of a charter for a single voyage but the analogy of a contract for delivery of goods in instalments. There was nothing to indicate that the ship intended to deviate in the second voyage and the charterers cannot refuse to implement the contract with regard to the second voyage.

BRITANNIA ELECTRIC LAMP WOKS *v.* MANDLER &Co., (1939) 2 K.B. 129.

Bills of exchange—Liability of indorser—Necessity for presentment for payment at address mentioned—Indorsement by a person who is managing director without any description—If indorsement by the company.

The document reads: "£100. 23rd September, 1937. Two months after date pay to our order the sum of £100 for value received". Across it is written "Accepted and payable at 2, Manville Road, Balham, S.W. 17" and then the rubber stamp "D. Mandler & Co. Ltd. . . . Managing Director" and D. Mandler signs his name above Managing Director and also on the back of the document.

Held, the document cannot be read as a promissory note made by D. Mandler and the signature (on the back of the document) of D. Mandler without any description cannot be read as the signature of the company and the document is futile. Presentment for payment must, if in the body of the note it is made payable at a particular place, be made at that particular place in order to render the indorser liable.

THE ABODI MENDI, (1939) P. 178.

Shipping—Action in rem *for possession of ship—Ship put in charge of the marshal of the Admiralty—Refusal of access to ship to master appointed by owner—If interference with custody of ship—Procedure.*

The Republican Government of Spain claiming to have requisitioned a Spanish ship issued a writ *in rem* and the ship was arrested by a marshal of the Admiralty. The owners entered unconditional appearance and the Nationalist Government also entered conditional appearance and claimed also to have requisitioned the ship. Plaintiff then gave notice of discontinuance of the action and asked that the warrant of arrest may be removed and defendant endorsed consent. On the same day plaintiff prevented the master from entering the ship and defendant withdrew the consent and moved by summons for the reinstatement of the master and the plaintiff asked for removal of arrest on the ground of discontinuance of the action.

Held, in an action for possession, once the ship was put into the charge of the marshal of the Admiralty Court, all persons concerned in the litigation were under a duty to abstain from any interference with the custody of the ship by the marshal. The exclusion of the master constituted a contempt and the master should be reinstated. Parties were given liberty to extract the release from the Registry after the master was reinstated.

In re HORROCKS: TAYLOR *v.* KERSHAW, (1939) P. 198.

Will—Probate—Jurisdiction of Probate Court to delete word —If to be exercised where omission of word will alter the sense of the will.

By a will of May 14, 1925 the testatrix bequathed the residue of her real and personal estate to her trustee in trust for such charitable institution or institutions or other *charitable or benevolent* object or objects..... The testatrix died on March 29, 1929 and the will and codicil were proved in common form on May 7, 1929 and the legacies paid. The respondents held the residue as trustees upon trusts declared by the will. In the 1st half of 1937, the solicitor of the testatrix was alleged to have discovered a typist's error

in the will of "or" instead of "and" in "charitable or benevolent." The respondents applied to have the probate corrected by the omission of the word "or". As the appellants objected to such important matter being decided on motion the writ was issued claiming to have the common form grant revoked and probate in solemn form with the omission of the word "or", granted,

Held, the Court of Probate has no jurisdiction to reject a word, the result of which would be to alter the sense of what remains and defeat the intention of the testatrix.

SIFTON *v.* SIFTON, (1939) P. 221.

Divorce—Husband's petition based on desertion—Discretion statement by petitioner admitting adultery—Answer by wife denying desertion and alleging adultery—Discretion statement by husband—If admissible in evidence.

The evidence given by the husband of his own adultery and the discretion statement put in evidence in earlier *ex parte* stage was available for the wife's framing of her counter-charge of adultery. In a petition for divorce based on desertion the presumption is against the deserting spouse and it is not incumbent on the petitioning husband (notwithstanding he did not expect or really want his wife to come back) to show that he was at all material times ready and willing to receive her.

CLARK *v.* CLARK (*No.* 1), (1939) P. 228.

Divorce—Adultery—Birth of child within 174 *days of access—If sufficient proof of adultery.*

A husband filed a petition against his wife, on the charge of adultery based simply and solely on the fact that on February 10, 1936, the wife gave birth to a child and that if the husband was in fact the father, the earliest possible date on which conception could have taken place was August 20, 1935.

Held, on the medical and other evidence it is utterly impossible to say that there is anything extravagantly improbable about this being a viable child, and there is no ground for saying that the child is illegitimate.

GALENE *v.* GALENE OTHERWISE GALICE, (1939) P. 237.

Husband and wife—Annulment of marriage by competent French Court—Judgment in rem*—English Courts—Duty to enforce.*

The marriage (in England) of the petitioner (a citizen domiciled in France) was annulled by a Court of competent jurisdiction in France on the ground of informality under French Law. Applying the general principle that a judgment of the competent

Court of the domicile is a judgment *in rem* which must be recognised and enforced by the English Court unless it is obtained by fraud, collusion or other unlawful means, *held*, a decree *nisi* of nullity ought to be granted.

JORDAN *v.* JORDAN, (1939) P. 239.

Divorce—Desertion—Previous proceedings—If terminates or suspends period of desertion.

The husband filed a petition for divorce on the ground of desertion for at least 3 years preceding the presentation of the petition (January 17, 1938). The wife left the husband on October 16, 1932 and there had been no resumption of co-habitation since the date. On March 1, 1933, the husband filed a petition for divorce on the ground of wife's adultery. The suit was undefended and decree *nisi* was passed on June 14, 1933. On December 18, 1933, the wife and correspondent obtained leave to appear and an order that decree shold not be made absolute before January, 22, 1934. On January, 19, 1934, the decree *nisi* was rescinded and the case ordered to be reheard. On January 26, 1934, the wife filed an answer denying adultery and making a cross-charge of adultery against her husband and prayed for divorce. On October 19, 1934, the husband's petition and wife's prayer in her reply were dismissed. There was no resumption of co-habitation.

Held, the fact of the institution and prosecution of proceedings by the deserted spouse does not absolutely terminate the offence of desertion but merely precludes him or her from asserting that the period of desertion runs during the pendency of those proceedings and that as a matter of law, the continued absence of the other spouse can re-assume "the quality of desertion" after the suspensory bar has been removed by the termination of the suit although there has been no subsequent resumption of co-habitation. It is not a condition precedent to the revival or continuance of the original desertion after earlier proceedings are disposed of, that some active steps have been taken by the petitioner towards bringing about a resumption of co-habitation.

CLARK *v.* CLARK (No. 2), (1939) P. 257.

Divorce—Desertion—Non-payment of amounts due under deed of separation—If intention to desert can be inferred.

By a deed of separation provision was made for the payment of 35*s.* per week to the wife and the husband paid for a considerable time, though irregularly and the wife eventually put the deed in suit and obtained judgment. In the wife's petition for divorce on the ground of desertion.

Held, from mere non-payment of the amounts under the separation deed, desertion cannot be inferred. Unless the withholding of payment is wilful, it has no significance.

SHAW *v.* SHAW, (1939) P. 269.

Divorce—Desertion—Refusal to commence co-habitation after expiry of agreement to postpone inception—If constitutes desertion.

A spouse who without excuse refuses to commence co-habitation after the expiration of an agreement merely to postpone its inception, can also be guilty of desertion.

BENNETT *v.* BENNETT, (1939) P. 274.

Divorce—Desertion—Insanity of deserting spouse—Effect.

Before a decree of dissolution for desertion can be granted, there must be desertion for 3 years immediately preceding the presentation of the petition. So, where a wife whilst sane, in fact deserted her husband for 31 years was certified as insane and was in a mental hospital for 18 months preceding the presentation of the petition.

Held, when she became insane her intention to desert came to an end, unless it is proved that although she was certified insane, on the question of co-habitation with her husband, she remained capable of forming a reasoned judgment. The burden of proof that she retains a rational intention to desert her husband rests on the petitioner.

JOTTINGS AND CUTTINGS.

Lord Shaftesbury as Lord Chancellor.—We read that when Lord Shaftesbury, who was appointed Lord Chancellor in 1672, sat in Court he wore neither wig nor cap, but a hat which Roger North charitably assumed might once have been black. In the Examen we are told that "His Lordship regarded censure so little, that he did not concern himself to use a decent habit as became a Judge of his station; for he sat upon the Bench in an ash-coloured gown silver-laced, and full-ribboned pantaloons displayed without any black at all in his garb, unless it was his hat which now I cannot positively say, though I saw him, was so." Another writer tells us that as late as the reign of Queen Anne, a Lord Keeper wore his own hair in Court, until he received the Sovereign's express order to adopt the venerable disguise of a full-bottomed wig. Lady Sarah Cooper recorded of her father, who was appointed Lord Keeper in 1705, that "the Queen after this was persuaded to trust

a Whig ministry, and in the year 1705, October, she made my father Lord Keeper of the Great Seal, in the 41st year of his age—'tis said the youngest Lord Keeper that ever had been. He looked very young, and wearing his own hair made him appear yet more so, which the Queen observing, obliged him to cut it off, telling him the world would say she had given the seals to a boy." Obeying the regal command he, when he appeared in Court in his wig, looked so grave and reverend that the Queen had to look at him twice before she recognised him.—*L.T., 1939, p. 342.*

Counsels' Wig.—It is said that when members of the Bar began to adopt the wig in Court, the judges looked upon them as coxcombical in the last degree, and one writer goes so far as to say that the more prudent, not to say cunning, barristers, declined to adopt the obnoxious head-covering. Chief Justice Hale, an austere man, in particular, looked with much disfavour on counsel who wore periwigs and attorneys who went with swords. But the Court wig made headway, if the paronomasia may be pardoned, and it became almost universal by the close of the seventeenth century. In Scotland, however, the wig as the head covering for members of the Faculty of Advocates was slower in coming into vogue, the cocked hat and the powdered hair being the fashion. When Alexander Wedderburn joined the Faculty in 1754 wigs had not come into fashion with the Edinburgh advocates; and when precisely they did does not seem to be established. Even as late as the early part of the last century Jeffrey was accustomed to appear in the Court of Session without the conventional forensic head covering, but probably he was among the last to be thus conservative.—*L.T.*, 1939, *p.* 343.

Sir Henry James's Wig.—Older members of the Bar may recall Sir Henry James while still in practice, and they may remember that he was one of the last to have his wig periodically powdered, to make it, like that of the Laird of Cockpen already mentioned, "as guid as when new." But he had a singular experience once while in Court. Being a Queen's Counsel, he was, of course, seated in the front row, where he wss waiting to be called upon when his opponent had concluded his argument. Leaning back, the tails of his wig were seen by one of the old reporters, who sat immediately behind, to be getting into perilous proximity to the ink well in the juniors' row. With the laudable desire to save the white tails of the distinguished counsel's wig from being immersed in the ink, the reporter, whom the present writer knew well, gallantly came to the rescue by cautiously inserting his pen into the loop of the wig and proceeding to edge it to a safe distance, when, as ill-luck would have it, Sir Henry somewhat abruptly jerked his head, with the consequence that the pen, still entangled in the loop, twitched the

wig right off, to the intense amazement of Sir Henry, who, naturally, turned round sharply, imagining that some diabolical agency had been at work. Hurried explanations were offered, and the incident ended like the fairy tales, quite happily. It was certainly an adventure for the reporter, and it gave him something to talk of in his later years.—*L.T. 1939, p. 343.*

Law Revision.—Lawyers are frequently, though quite ungenerously, assumed to seek the perpetuation of old rules in which they have been nurtured, regardless of the fact that they may run counter to what the ordinary person would consider fair dealing between man and man. For the most part, lawyers, like others, have to accept the law as they find it, but it is worth emphasising that most of the reforms, both in its substance and in its form, have emanated from members of the profession. The Law Revision Committee, during the few years of its existence, has been able to suggest various reforms which have proved of immense value as bringing rules of law more into consonance with its moral aspect. Now the committee has made a very practical proposal, namely, the modification of the rule laid down, no doubt correctly in strict law but on lines which many thought exceedingly harsh, in *Chandler* v. *Webster*, (1904) 1 K.B. 493, a case arising out of the postponement of the Coronation Procession in June, 1902, deciding that no action would lie to recover back money paid by the defendant to the plaintiff for the right to view the royal procession from his window. There, it will be remembered, the Court of Appeal decided that the defendant was entitled not only to retain the money paid on account, but was entitled also to recover the balance, the right to which had, by the terms of the contract, accrued prior to the date when the contract became impossible of performance. No doubt as the law stood, and still stands, the decision was correct, but nevertheless it could not fail to strike the layman, particularly the defendant in the action, and lawyers as well, as difficult to reconcile with justice. Sharing this view the Law Revision Committee propose that the rule should be modified by providing that in such circumstances the money paid prior to the frustration of the contract shall be recoverable, but subject to the deduction of such sum as represents a fair allowance for expenditure incurred by the payee for the purpose of performing the contract. Further, when at the moment of frustration the contract has been in part performed and that part is severable, the proposed rule is to apply only to that part of the contract which remains unperformed.—*S.J., 1939, p. 385.*

The Recommendations.—The recommendations concerning this important matter should be set out in detail. They are to the effect that the following rules shall apply when performance of a contract has been frustrated in whole or in part and any money has

been paid, or has been agreed to be paid, at a time prior to the frustration: (1) Money paid by the one party to the other in pursuance of the contract shall be recoverable, but subject to a deduction of such sum as represents a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract. In fixing the amount of such deduction the Court shall include an allowance for overhead expenses, but shall also take into account any benefits accruing to the payee by reason of such expenditure, and the amount recovered shall not exceed the total of any money so paid or agreed to be paid under the contract. Loss of profit shall in no case be taken into consideration. (2) When at the moment of frustration the contract has been performed in part and the part so performed is severable, these rules shall apply only to that part of the contract which remains unperformed, and shall not affect or vary the price or other pecuniary consideration paid or payable in respect of that part of the contract which has been so performed. (3) For the purpose of these recommendations no regard shall be had to amounts receivable under any contracts of insurance. Finally, it should be observed that the committee does not recommend any alteration in the law relating to freight *pro rata itineris*. It is recognised that the rule has been frequently criticised, but considered that it has become so firmly fixed that it would be undesirable to alter it. For the same reason no alteration in the law relating to advance freight is favoured, except in the case of hire paid in advance under a time charter, which, it is considered, should be recoverable in the event of frustration of the adventure in the same manner and to the same extent as other payments in advance made under a contract. The report of the Committee is published as a White Paper by H. M. Stationery Office (Cmd. 6,009, price 2*d* net).—*S.J., 1939, p. 385.*

Bowen's Version of Latin Maxim.—In the Life of Lord Bowen, written by Sir Henry Stewart Cunningham, are enshrined many examples of the bright, sparkling wit for which Bowen was famous, one of these being a capital instance of a delightful manipulation of a well-known maxim. When it was uttered, Bowen was still at the Bar and he was appearing for the plaintiff, who was grounding his right to a piece of unenclosed land on the fact that his donkey had been habitually pastured upon it. At the close of the argument the judge inquired whether the plaintiff claimed the land through his accredited agent, the donkey. "Yes, my Lord," was Bowen's prompt reply. "My contention is, *Qui facit per asinum facit per se.*" What could have been neater?—*L.T., 1939, p. 359.*

Bias.—If Lord Hewart had no other claims to fame he would be honoured by present and future lawyers for his judgment in *R.* v. *Sussex Justices*: Ex parte *McCarthy*, (1924) 1 K.B. 256. The famous passage, in which he insists that in all Courts justice must

not only be done, but must be clearly and undoubtedly be seen to be done, has been so often quoted that few lawyers do not know it. Yet the fundamental rule which it expresses is still sometimes ignored by those who have to administer justice in inferior Courts. Last week a case of this kind came before a Divisional Court in the Divorce Division. A husband appealed against an order for maintenance which had been made by a Magistrate in a western city. He supported his application by evidence showing that the learned Magistrate was an intimate friend of his wife and his mother-in-law. He showed that his wife had told him (the applicant) that she would take steps to bring her complaint, or some similar complaint, before the Court on the particular day when this magistrate was sitting. The husband made due protest when the case came on below, but was overruled. Now he has got a new trial. The judges were careful to exonerate the magistrate from all charge of partiality; which, of course, we endorse. That was not the issue. The applicant may have got a fair trial: but could reasonably think that he had not.—*L.J., 1939, p. 299.*

Lord Merrivale.—Lord Merrivale, known at the Bar as Henry Duke, who died last Saturday at the age of 83, was the last survivor of the great advocates who dominated the Common Law Bar and won popular fame at the beginning of the present century; the others were Rufus Isaacs, Edward Carson, F. E. Smith and Marshall Hall. Sir Edward Clarke was earlier. The careers of the first three are well known. Marshall Hall did not go beyond advocacy. While at the Bar Henry Duke was the equal of any of them. Perhaps in his restrained and effective handling of cases he surpassed them. And he made his position entirely by his own merits. Without the advantages of public school or university education, he passed from apprenticeship in West Country journalism to the Press Gallery of the House of Commons, and then in 1885 he was called by Gray's Inn, and renewed his West Country associations on the Western Circuit. But all this was only the prelude to the position he won in London. Marshall Hall and Rufus Isaacs took silk in 1898, Henry Duke followed them in the following year. "F.E." was ten years later in 1908. Carson was already an Irish Q.C. when he came to the English Bar in 1892, and the silk in this country, which was at first refused to him, he obtained in 1894. After nearly 20 years in the first rank at the Bar, Duke became Secretary for Ireland when the Dublin Rebellion had broken Birrell's career there. But though Duke continued a policy of leniency, he succeeded little better than others. In 1918 he found a more congenial position in the Court of Appeal. A year later he became President of the Probate, Divorce and Admiralty Division, and was raised to the Peerage as Lord Merrivale in 1925. In the Divorce Court he had to deal with the new conditions due to the Matrimonial Causes Act, 1923, and he proved himself a capable, courteous and dignified

judge. His judgment in *Apted* v. *Apted* in 1930 had an important effect in fixing the present manner in which the judicial discretion in divorce is exercised. "Above all things," said Sir Francis Bacon of judges, "integrity is their portion and proper virtue". The words may fittingly be applied to Lord Merrivale.—*L.J., 1939, p. 369.*

A Famous Saying.—I have seen in an old file of the *Westminster Gazette* correspondence relating to the question as to whether Lord Justice Mathew, who had recently died, was the inventor or first author of the phrase admittedly used by him:

"Truth will out, even in an affidavit."

What Sir James Mathew "certainly said", according to one correspondent, was: "Truth will leak out, even in an affidavit". "The occasion", said the writer, "upon which he committed this brilliancy was an action brought to recover some land. At the end of the plaintiff's case it was submitted that there was nothing to show that the defendant was in occupation of the premises, and upon the evidence given at the trial the objection seemed to be fatal. But it occurred to the plaintiff's advisers that in an affidavit, made in an interlocutory application when it was important that the defendant should maintain the *status quo,* he had sworn that he was in possession. The affidavit was put in, and Mr. Justice Mathew (as he then was) gave judgment for the plaintiff in the single sentence aforesaid."

It had been alleged that Charles Reade had already coined the phrase. "If so," said the correspondent, "the learned Judge might well say, '*Pereant qui ante nos nostra dixerunt*!' "—*L.J., 1939, p. 380.*

Truth Will Out.—The *Westminster* itself, writing from recollection, was "quite sure it was Charles Reade who first jested as to the affidavit". Later it gave the reference. "We have now before us as we write a copy of *The Cloister and the Hearth,* and in Chapter XXVII (page 171 of our edition) we have the following:

"Alas! It was an unlucky day. His sincere desire and honest endeavour to perjure himself were baffled by a circumstance he had never foreseen nor, indeed, thought possible.

He had spoken the truth.

And IN AN AFFIDAVIT'"

The *Westminster* thought the Judge was quoting what at the time he believed to be familiar to many.

Another newspaper was of opinion that the legal *bon mot* was generally misunderstood. "He was not," said this paper, "disparag-

ing the veracity of affidavits, though cynics have naturally seized on this interpretation, but contrasting unfavourably the value of written documents for getting at the whole truth with that of cross-examination".—*L.J., 1939, p. 380.*

Lord Merrivale.—No man who, before Ireland was a nation, allowed himself to be appointed to the Chief Secretaryship for that country could reasonably expect to survive the experience with unimpaired prestige. He might indeed survive, but hardly as a politician. Lord Merrivale, when he was Mr. Duke, K.C., M.P., a patriot, went to Ireland after the Easter Rebellion of 1916 not fully knowing whither and to what kind of people and problems he went. "Who are these Sin Feeners?" he asked an Irish friend of the English Bar a few days before he went to Dublin as Chief Secretary.

No further rebellion occurred in his time, but he was not regarded as wholly successful. He resigned in 1918; and returning to England and the law happily succeeded Swinfen-Eady, L.J., in the Court of Appeal. After 18 months he became President of the P. D. and A. Division, and so continued, living in Gray's Inn, until his retirement in 1933. Calm, seeming slow, patient, just, courteous and Devonian, he looked and was in fact grandly judicial, despite a certain hardness of hearing which hampered him in his later years.

I can just remember the days when Carson and he were often the "fashionable" leaders on opposing sides in the K.B. Quick in perception and slow of speech were both; well-matched, too; and the forensic battles of the Devonian and the Irishman were the students' joy.—*L.J., 1939, p. 381.*

Dissenting Judgments in the Lords.—Correspondence in the *Times,* to which Lord Dunedin and Dr. A. F. Pollard have contributed, has raised the question of the value of dissenting judgments in the House of Lords, and also of the different practice as to such judgments in the House of Lords and the Privy Council. The two questions are related, but distinct. Everyone knows the value of dissenting judgments. They are the whiff of salt sea air that keeps the judicial atmosphere of the House of Lords fresh and invogorating. Of course, the law and its application, however uncertain and confused the issue till the case reaches the House of Lords, may by the time it has arrived there become, if not clear, at least reasonably certain, and then the Lords follow their leader, each, in Lord Bowen's phrase, becoming Lord Concurry. At other times the lists are set and there is battle royal. The best known instance is the duel between Lord Birkenhead and Lord Sumner in the Russell legitimacy case in 1924, and in a sense Lord Dunedin decided the dispute, for had he been on the side of Lord Sumner instead of on

the side of Lord Birkenhead, Lord Sumner would have won. Still more dramatic is it when a single Lord—an Abdiel in the Judicial Peerage—stands firm against the serried ranks of the majority who make the law by the sheer force of numbers. So Lord Shaw—not yet Viscount Craigmyle—upheld Magna Carta and the liberty of the subject in *Zadig's* case in 1917, and Lord Finlay struck a shrewd blow for Christianity in *Bowman* v. *Secular Society*. No, we could not do without the Great Dissenters in the House of Lords, useful as Lord Concurry may be.—*L.J., 1939, p. 403.*

The Unanimity of the Judicial Committee.—And when we pass from the House of Lords to the Judicial Committee, we find a great change. No one would speak without sincere respect of this Tribunal. For one thing its jurisdiction is the widest of any court in the world. It extends over a quarter of the population of the globe. For another, there is no fuss about it. "Its business is the search for truth; and the stuff which it works in is justice. A grave task and austere, according so much with simplicity and quiet that there is no place there for even the paraphernalia of a court." But while the great position which the Judicial Committee holds is well recognised, we do not suppose that its judgments rank in interest and weight with those delivered in the House of Lords. In the Judicial Committee there is no dissent, and members of the court who do not agree—if there ever are any—have to submit with a good grace. As to what happens when there is a difference of opinion history perhaps is silent. Lord Dunedin says that there would be no difficulty in recording a dissenting opinion; but he does not say that he ever did so. Dr. Pollard differs. He expresses the usual view that Judicial Committee judgments are unanimous because the members are not giving judgments, but advising the Crown, and they must speak with one voice. And he points to the practical difficulty in reversing a judgment by legislation. This can be readily done with a judgment of the House of Lords, but there is no common legislature to override a decision of the Privy Council. For this reason, perhaps, the House of Lords is bound by its own decisions; the Judicial Committee is not. Appeals to the House of Lords are now restricted, and the Judicial Committee no longer receives appeals—or very rarely—from some of the Dominions; but both these final Tribunals are held in high esteem.—*L.J., 1939, p. 403.*

Judah Philip Benjamin.—In the course of his recent miscellaneous reading the present writer has met with various references to the striking career of this distinguished lawyer whose memory is perpetuated in the Profession by his classic work on Sale. Born in the West Indies, Benjamin started his professional work in New Orleans, and soon built up a large practice, for he was a forceful advocate and a shrewd adviser. Ere long he conjoined legal work

with a keen interest in politics, in 1861 joining Jefferson Davis's Cabinet as Attorney-General, and later becoming his Secretary of State till the collapse of the Confederates. Escaping in an open boat, he eventually reached this country, where he was in due time called to the Bar through the good offices of Lord Cairns, after only a short probationary period, and, despite a not over-prepossessing appearance and a voice with the very worst of American twangs, he triumphed over those disadvantages and made his merits known.—*L.T., 1939, p. 391.*

An Early Case.—The late Sir John Hollams, in his pleasant little book of professional reminiscences, had a good deal to say of Benjamin, of his forcefulness in advocacy and persistency in the submission of his points, instancing his appearance as junior in a Chancery suit instituted by the American Government against certain agents in this country with respect to the expenditure of the large amount raised in Europe by the issue of Confederate bonds. The suit came on before Vice-Chancellor James, and it appeared that, as usual at that time, a decree would be made directing inquiries in chambers, when, suddenly Benjamin rose, and to the astonishment of all present, began thus in a stentorian voice: "Notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend, Sir Roundell Palmer, and to some extent acquiesced in by my learned leader, Mr. Kay, if you will only listen to me—if you will only listen to me—(repeating the same words three times, and on each occasion in a crescendo), I pledge myself you will dismiss this suit with costs". Sir John added that the Vice-Chancellor, Sir Roundell Palmer and the whole court looked at Benjamin in amazement, but he went calmly on without intermission for an hour or two. The court became crowded, for it was very soon bruited about that something singular was going on in the usually quiet court of the Vice-Chancellor. In the end the suit was dismissed, and this dismissal was confirmed on appeal.—*L.T., 1939, p. 391.*

Pressing Appointment.—Often a joke has a longer and more complicated ancestry than you might think. I myself have traced one back with little variation to the time of the ancient Romans. Thus in a recent number of a comic paper there was a drawing of an infuriated lady in bridal dress standing in an office ante-room while the switch-board girl calls through: "There is a lady to see you, Mr. Larkin. Says you had a ten o'clock appointment with her." Now, more than a hundred years ago, the Inns of Court used to rock with laughter at the story of Mr. Serjeant Hill's wedding day. In the morning he went to his chambers as usual but, becoming immersed in a brief, forgot all about his engagement. Time passed and at last a messenger was sent in search of him and

brought him safely to the church. After the ceremony he found means to get back to his library to look up another case, and it was dinner time before his clerk could get him packed off home to his expectant bride. I believe it was Chief Baron Palles whose last thought as he left for his honeymoon was to take Fern on "Contingent Remainders" with him.—*S.J., 1939, p. 475.*

A Bold Peer.—An extra from the *Morning Post* of a hundred and fifty years ago tells how after a conflict between Lord Stanhope and several bishops on a Bill brought in by him, another Bill was postponed to a future date, the noble lord declaring "that he would on that day teach the Lord Chancellor of England law as he had on the present taught the Bench of Bishops gospel". One can only gasp at his boldness thus to beard Lord Thurlow on the Woolsack:

> "That rugged Thurlow who with Sullen Scowl
> In surly mood at friend and foe will growl."

Hardly had be received his peerage when he cowed the whole House of Lords by trampling on the Duke of Grafton who had sneered at his plebeian origin. "The noble Duke", he said, "cannot look before him, behind him or on either side of him without seeking some noble Peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel it is as honourable to owe it to these as to being the accident of an accident?" His verbal ferocity caused him to be known as "The Tiger". Once the Bishop of Peterborough fell foul of him by speaking of "fruitless desolation" which, said the Chancellor, is "an expression which carries no meaning and is neither sense nor grammar. It is not supported by any figure of speech or by any logic or even by any vulgarism that I ever heard. 'Fruitless desolation,' my lords, is rank nonsense. I was not aware before that desolation might be fruitful."—*S.J., 1939, p. 475.*

The Week's Personality.—On the 22nd June, 1861, Lord Campbell seemed, despite his eighty-one years, to be in full vigorous health. Only two years before he had taken on the Chancellorship, a final proof of his supreme talent for getting on, and after a life spent in the Common Law Courts he had turned himself into a respectable Equity Judge. On this day, in 1861, he drove to Lincoln's Inn with two of his daughters, sat in court till the afternoon and then went to Downing Street for a Cabinet meeting. Then he went home to Stratheden House and, having some time to spare before preparing for a dinner party, he sat down at his desk and wrote a judgment. The first of his guests to arrive was his old friend Sir David Dundas, who had just come from the bedside of one who had been stricken with the loss of all his faculties. Campbell declared that there should be added to the litany a fresh

petition: "From a lingering illness, Good Lord deliver us". He entertained his guests with animation and bidding his children good night finally retired to his room near midnight. Next morning his servant found him sitting in his chair dead. He had been "honourably released from the labours and anxieties of the Great Seal".—*S J., 1939, p. 495.*

No Flying Start.—In a recent address in Gray's Inn Hall, Sir Wilfrid Greene, the Master of the Rolls, pricked the bubble of a common illusion that an advocate's life is a series of dramatic incidents by which he attains success with no mental effort. He also treated as imaginary the popular picture of the fortune-making brief unexpectedly delivered to a young advocate sitting in his chambers at 5 o'clock on a Saturday afternoon by a desperate solicitor who has hunted through the rest of the deserted temple. There is rarely any drama about a first brief. When the future Lord Sankey first went into a London court he took ten volumes of law reports and was very apprehensive of the pugnacious reputation of his opponent. To keep his courage up he kept murmuring: "There is a tide in the affairs of men." But there was no tide. The other side submitted to judgment and all he had to say was: "My lord, I ask for costs." The great *Hawkins, J.*, returned his first brief because the prisoner he was briefed to defend on a charge of stealing a wheelbarrow had pleaded guilty. He only realised his foolishness when he heard a senior counsel who had pocketed the guinea simply admit the man's guilt and express the hope that the Judge would deal leniently with him. Equally undramatic was the coming of the first client to the future Mr. Justice Alpers of New Zealand where Bar and solicitors are one. A member of the profession brought him an affidavit to be sworn, but suddenly he remembered that he had not the remotest idea of the proper form of words. He therefore had to appeal to his visitor, who obligingly dictated the formula and was duly sworn.—*S.J., 1939, p. 495.*

First Appearances.—Sometimes briefs do come out of the blue. The late Mr. Balfour Browne, K.C., on his first circuit, received a brief at Derby from an unknown solicitor. When the case was over he asked his client how he came to deliver it to him, and received the cryptic reply: "It was because you went into court last". But though Balfour Browne tried the method again it never worked. The famous Montagu Williams, who became a great criminal advocate, made a very poor show in his first case, a prosecution for horse-stealing. On the inevitable acquittal, he so far forgot himself as to jump up in great anxiety, exclaiming: "My lord, what's to become of the horse?" Marshall Hall's first employment was a Chancery case in which all he had to do was to consent to an injunction against his client.—*S.J., 1939, p. 495.*

Enthusiasm for the Law.—We have it on the uncontrovertible authority of Lord Chancellor Bacon that every man is a debtor to his profession, a pronouncement which presumably means that those belonging to the particular calling owe to it the obligation of carrying out the duties entrusted to them with the utmost diligence and with the like integrity. This is, of course, true of all professions, but it is especially true of that to which we belong; but while members of the legal profession readily acknowledge the obligations incumbent upon them towards their clients and towards the court, not everyone evinces any particular enthusiasm for the work he may be called upon to undertake. He may, no doubt, feel a generous warmth when briefs arrive at his chambers marked with comfortable fees; further, in the heat of advocacy he may feel something of that joy which, according to Sir Walter Scott, the warrior feels on encountering a foeman worthy of his steel, but this is the joy of conflict rather than the quiet satisfaction which animates the expert on some legal subject when something he has undertaken to carry out eventuates in a complete success. Curiously enough, such a sense of satisfaction seems to have been attained by those of whom the great world in the sphere of law know nothing or very little, such as those whose lives, professionally speaking, have been spent in the quietude of their chambers in the drafting or the revision of documents either for the purposes of litigation or the investigation of title.—*L.T., 1939, p. 423.*

Lord Campbell's Tribute.—The many volumes that came from the busy pen of Lord Campbell treating of the lives of the Lord Chancellors and Chief Justices may not all be taken *au pied de la lettre* in the matter of strict accuracy or just appreciation of the various characters who move across his pages, but at least this may be said with assurance that he was able to write so attractively that he who runneth may read. There is no gainsaying the brilliance of his writing and the intense human interest he gives to his biographies. Occasionally, too, he intersperses an anecdote of special interest, and one of these is particularly relevant to the matter in hand. In his biography of Thomas Parker, who rose to be Lord Chancellor Macclesfield in the Georgian period and who was a particularly fortunate person in some respects, we read that on his being presented with the Great Seal in 1718 it was accompanied by an extraordinary gift of £14,000 from the King, while his son was granted a yearly pension of £1200 till he obtained the place of teller of the Exchequer, to which he was appointed in the following year. It is true that Lord Macclesfield fell on evil days by reason of corruption in the sale of offices and of other delinquencies not quite fitting his position as the head of the law. The point in connection with this Lord Chancellor to which attention is called by Campbell on the topic now under discussion dates from the days when Macclesfield was still at the Bar and was only Mr. Parker:

As counsel in the once famous *cause celebre, Regina* v. *Tutchin,* which was tried by Lord Holt at the Guildhall, his argument on the objection taken to the regularity of the jury process, Campbell says, was "most masterly, and by genuine lawyers is perused with enthusiasm". This then leads Campbell to append a foot-note which is surely one of the most delightful of his anecdotes, namely, a saying of the deceased Mr. Duval, the greatest conveyancer of his day. On being asked by Campbell whether the constant perusal of abstracts of title was not "weary work" Duval replied thus: "It is sometimes a little dull; but every now and again one meets with a brilliant deed, which is a reward for all one's labour." To this confession of enthusiasm Campbell appends no less than three notes of exclamation, as if to call attention to the absurdity of the remark; but while our individual tastes may not run exactly in the same direction as Duval's, we may admire the genuine enthusiasm he brought to his daily round and common task.—*L.T., 1939, p. 423.*

Theobald Mathew.—We very much regret to have to record the death of Mr. Theobald Mathew at the age of 72. The son of Lord Justice Mathew, who was one of the great Judges of late Victorian years, he showed, though in a less prominent sphere, the abilities of his father abilities enlivened by a humour to which pen and pencil alike bore witness. To readers of The Law Journal he was known by his *Forensic Fables,* which for a series of years portrayed the lighter side of litigation. In this he followed in the steps of Sir Frank Lockwood, whose sketches, both legal and political, delighted an earlier generation. And Theobald Mathew's abilities were shown, in a more serious though still very interesting way, in the collection of essays which he published in 1937 under the title *For Lawyers and Others.* The *Duchess of Kingston's* case is a well-known leading case in Estoppel, but Mathew's account of it brought out the human interest which its technicalities concealed. And he was equally at home in the "Decline and fall of the Serjeants" and in the need for reforming the Judicature Acts. But these were only diversions. "Silk" did not win him from the Junior Bar, and he remained there to give his numerous clients the benefit of his wide knowledge of legal principle and his shrewd judgment on the possibilities of their cases. And with his combination of wit, kindness and learning it is small wonder that he gained with the Bar a position of esteem which is rarely rivalled.—*L.J., 1939. p. 443.*

The Macnaghtens.—The Hon. Mr. Justice Macnaghten, who has been on the Bench for more than 10 years, is in himself a justification of the hereditary principle. In him more than in any other contemporary Judge the learning and principles of the Common Law and of Equity are combined, and he can apply them without conflict.

In his earlier youth he went from Eton to Cambridge with a major scholarship at Trinity; he was President of the Union in 1890 and graduated with a First in the Historical Tripos in 1891. Called by Lincoln's Inn in 1894 he was elected Bencher in 1915 and took silk in 1919, and both as junior and silk had a large practice. Unionist M. P. for North Derry in 1922, he was elected for the City and County of Londonderry in November of that year and he continued until his election to the Bench in 1928. He was returned at the previous General Election by the largest majority of any member of the House.

The great Lord Macnaghten, appointed direct from the Bar to the House of Lords, who twice refused offers of Judgeships and once the Principal Secretaryship of State was his father, of whom it is written in the *Dictionary of National Biography*: "As a Judge his name will long endure. He possessed in a happy combination the gifts of listening with patience and deciding without doubt, after bringing to bear his great range of unobtruded learning and a clear practical appreciation of business and of character .... it was remarkable that both Bench and Bar fell into the way of citing a sentence or two of an opinion of Macnaghten and of accepting it without discussion as an authoritative statement of the law."

The mother of Macnaghten, J., was the only child of Sir Samuel Martin, Baron of the Exchequer; "his vast knowledge of business and the vigour of his understanding enabled him to master the essential parts of a case with marvellous celerity and his judgments were marvels of terseness and precision." He went Circuit as a Judge, and where demanded by justice could impose a heavy sentence; but "his natural kindness of heart induced him not infrequently to endeavour to obtain their mitigation."—*L.J., 1939, p. 455.*

The Passing of Theobald Mathew.—Theo Mathew is dead. The Bar could not, by the death of any of its members, suffer a greater loss. He would go on working almost to the end of last term, when he ought to have rested. Last Friday, although he was very ill and spoke with difficulty, I thought he would recover; that his mind, keen and alert as ever, and his unquenchable spirit would compel his body to survive. He rejoiced to see his friends and to hear and speak of what was doing in the Temple; of the South-Eastern Circuit and of the dinner given to his friend "Malcolm" at Chelmsford; and the irresistible humour of his comments evoked laughter from the two who were with him, one of them the brave woman who nursed him to the end and is now his widow. Under the fresh shock of this melancholy news I know not what to say or how to say it. I am one of a great number who loved this man; and the grief we feel is not so much for the man of genius, the incomparable and kindly wit, the lawyer of great learning the inimi-

table author of forensic fables and caricatures the master of the spoken and the written word; but rather for the man incapable of meanness, the friend whose life was spent in helping others rather than himself. He went about doing good; and he did so as a good Christian unconscious of his merit, in accordance with the precept: Let not your left hand know what your right hand doeth.—*L.J., 1939, p. 455.*

Voluntary Judicial Service.—One notable characteristic of English public men is their readiness to undertake voluntarily duties without any reward save the satisfaction they may themselves feel in rendering useful service to the nation. Again and again this has been exemplified in various departments of our national life, and notably in that of the law. It might well be thought that one who has discharged the arduous functions to which a Judge of the Supreme Court is called, for the period entitling him to retire and thus obtain a well-earned rest, had sufficiently demonstrated his devotion to duty, but time and again ex-judges have returned to what the poet termed "the dusty purlieus of the law" in order to lend assistance in clearing the arrears which periodically have a knack of accumulating. This public spirit has again been exemplified during recent days in the Judicial Committee of the Privy Council, where Lord Fairfield, whom we best recall as Lord Justice Greer, and who only recently retired from the Court of Appeal where his profound legal learning and his invariable courtesy proved an asset of which we were all proud, and also Lord Salvesen, an ex-judge of the Court of Session, have been assisting in disposing of the heavy list of appeals which have come from the various outposts of Empire to find their definitive decision in the quietude of the Council Chamber. Seeing that the Judicial Committee has a jurisdiction unexampled in extent and diversity of laws it is of the greatest advantage to have on the Bench representatives of various systems of law, each being thus able to bring his special knowledge into the common stock, and so making the committee a centre of enlightenment in juristic learning.—*S.J., 1939, p. 505.*

Legal Formulas.—This week the House of Lords in its judicial capacity has delivered a large number of decisions, most of them of great importance, but it is curious to note that their lordships, in announcing their intention to deliver their decision, do not, as do the judges of the High Court and Court of Appeal, intimate in the cause list their intention to "give judgment" on a certain date, they announce that the case is "to be considered," which means that they will deliver their opinions; in other words their judgment. These little differences in terminology are duly reflected in the reports. In the Law Courts the reporter at the end of the argument he provides will probably use the words "*Cur. adv. vult.*", which, as we all know,

is the abbreviated form of stating that their lordships announced their intention to postpone giving their decision, whereas in the reports of cases in the House of Lords the corresponding formula is: "The House took time for consideration," and in due course, in the official list, the case will appear as "to be considered" on the date mentioned. These, to be sure, are small matters, but they have a certain interest, showing, no doubt, the force of tradition.—*S.J., 1939, p. 505.*

Limited Knowledge.—A story has come down to us regarding someone who might be described as a well-informed man who strenuously endeavoured to open up a conversation with a traveller whom he encountered on his route, but all his efforts to draw the latter proving futile, at last expostulated thus: "My friend, I have tried to talk to you on a great variety of subjects—the weather, politics, the law, the church, business, the crops, but all in vain. Is there any topic on which we might hold converse?" To this the hitherto unresponsive person replied: "Can you say anything pretty about bend leather?" Apparently this subject, whatever it might mean, was outside the talkative gentleman's parish and one gathers that no conversation ensued, as how could it? All cannot, it is true, be Admirable Crichtons with a universality of knowledge, but in the law it is of course essential to possess a considerable stock of knowledge of life and its affairs, and the greater the stock the more useful it will be found. This does not of course mean that we should be like him of whom Lowell wrote long ago as

"A reading machine, always wound up and going,
He mastered whatever was not worth knowing."

L.T., 1939, p. 11.

Gaps in Judicial Knowledge.—Occasionally it has happened that even on the Bench its occupant has had to confess to a lack of familiarity on some subject forming part of the case under discussion, or even has shown in a very marked degree that he is ignorant altogether of the matter discussed. One of the most amusing instances of this, due to unfamiliarity with local terms, is said to have occurred at Newcastle long ago. According to the story, the deputy-surveyor of the city was giving evidence at an important trial, and doing so in dialect of the true Northumbrian type. He deposed as follows: "As I was going along the quay, I saw a hubbleshew coming out of a charge-foot." The Judge, it is not surprising to be told, was not aware that on Tyne-side the term "hubbleshew" denoted a "concourse of riotous persons", or that the narrow alleys or lanes in the city were popularly known as "chares," and that the lower end of each alley was termed a "chare-foot", but he seemed at the moment to be puzzeled only by the curious word "hubbleshew", so he inquired its meaning, which having been ex-

plained by the witness, the Judge said: "And you mean to say that you saw a crowd of people come out of a chair foot?" "I do, my Lord," said the witness. Thereupon the story goes that the Judge turned to the jury, and remarked: "Gentlemen of the jury, it must be needless for me to inform you that this witness is insane!" It is to be hoped that his Lordship was eventually put right on the true meaning of a chare-foot, and as to the sanity of the witness, and that no miscarriage of justice was caused.—*L.T., 1939, p. 11.*

BOOK REVIEWS.

THE LAW OF MASTER AND SERVANT by Anadinath Sarkar, B.L. Published by Messrs. M. C. Sircar & Sons, Ltd., 14, College Square, Calcutta. Price Rs. 4.

In this short treatise on the subject of 'Master and Servant,' the author has succeeded in producing a useful book of reference. Under the various chapters, the relationship of Master and Servant with particular bearing on the topics of Servant and Agent, Servant and Bailee, Servant and Apprentice, etc., has been lucidly brought out with the case-law up to date, both English and Indian. The liability of master in an action for tort against the employee especially in the course of the master's service, is a subject of perennial interest coming before courts for decision, and we have the satisfaction that the book deals with it in a separate chapter adequately illustrating the points with leading cases.

We hope the modesty of the author in introducing the book to the public with the words 'nor does it aspire to stand on the same shelf with the masterly works on the subject' may not deter the eager students of that branch of the law from profiting much by a perusal of it.

INCOME-TAX RETURN AND HOW TO FILL IT by Surendra Singh, M.A., B.SC., LL.B. and D. R. Jain, A.C.A. (Eng. & Wales), A.S.A.A. (Lon.), F.F.C.S. (Lon.), 2, Hotu Singh Road, Lahore. Price Re. 1.

It will be found that this pamphlet is very timely after the recent amendment of the Income-tax Act. Many will agree that the recent amendment has only added more difficulties to an Act already not easy of understanding. Hence an attempt of the kind this pamphlet makes will receive the recognition it deserves.

MEDICO-LEGAL COURT COMPANION. Published by the Eastern Law House, Calcutta, 1939 Edn. Price Rs. 7-8-0.

The volume under review has deservedly enjoyed reputation for its clarity, and the fact that it has run into three editions makes its popularity more convincing to us.

The subject is discussed in every chapter with necessary references to the various sections of the Indian Penal Code. There is nothing therefore to detract us from realising the author's thorough grasp and exhaustive comprehension of the subject. The questions that are appended to this volume make the book more useful to those in the actual work of helping investigations of crimes by courts.

HINDU LAW, PRINCIPLES AND PRECEDENTS by N. R. Raghavachariar, Advocate, Associate Editor, The Law Weekly, Madras. Published by The Indian Law House, Mount Road, Madras. Price Rs. 8.

The second edition of Mr. Raghavachariar's Hindu Law has appeared none too soon. The first edition of the book has already won the approval of competent critics. Since the first edition, important enactments on some branches of Hindu Law have been passed by the Legislature, the most notable of which is the Hindu Women's Rights to Property Act of 1937. There has also appeared the latest edition of Mayne's Hindu Law from the pen of Mr. S. Srinivasa Iyengar which has thrown fresh light on many questions of Hindu Law. Several important decisions have been given by the various High Courts and by the Privy Council. In view of all these, Mr. Raghavachariar has had to re-write many portions of the book and add about 250 pages to it. As we observed in reviewing the first edition, the learned author has not rested content with giving references to the cases without marking his preference and giving his reasons for the same. We may notice in this connection that in dealing with the Hindu Women's Rights to Property Act, he has canvassed the view of Mr. S. Srinivasa Iyengar that the Amending Act of 1938 is *ultra vires* in so far as the succession to agricultural lands is concerned and has differed from it at pages 740 to 742 of the book, after discussing the question with reference to the rules of construction applicable to such questions and the decisions. It is needless to say that all the decisions have been noticed in their appropriate places. Two noticeable features of this edition are that new chapters have been added on the Law of Jains and the Hindu Women's Right to Property Act. We must also point to one welcome departure in this edition which is that references to all the non-official legal journals have been given of the cases referred to, so that the practitioners may not be compelled to look for any single report. We have no doubt that the book will be read with interest and profit by students, lawyers and judges.

LAW OF EVIDENCE IN INDIA AND BURMA (6th Edn.) by S. C. Sarkar, Judge, Calcutta Small Cause Court. Published by S. C. Sarkar & Sons, Ltd., College Square, Calcutta. Price Rs. 16.

Sarkar's Law of Evidence has been looked upon as one of the leading commentaries on the Indian Evidence Act and we welcome the

appearance of the sixth edition seven years after the fifth edition was published. A lengthy review of such a popular book is not called for as we had occasion to review the earlier editions and drew attention to its salient features. A number of decisions under the Act have appeared since the last edition and the learned author says that the citation in the present edition has increased by two thousand instances. A new feature of this edition is that under each section there is a synopsis given which gives references to pages in which each one of the topics referred to therein has been discussed and dealt with. We have no doubt that this edition will fully maintain the reputation of its predecessors.

THE LAW OF LOCAL BODIES IN THE MADRAS PRESIDENCY by Rao Saheb C. P. Ramachandra Rao, B.A., B.L. Published by V. S. N. Chari & Co., Nungambakkam, Madras. Price Rs. 6.

The object of this book is to impress upon the mind of the reader the fundamental principles of Local Self-Government law and to arouse a general interest in the subject. With that view the learned author has adopted a topical treatment and a narrative method of exposition of the provisions of the Madras District Municipalities Act and the Madras Local Boards Act. He has given references only to leading decisions as a fuller citation of cases will only embarrass the lay reader. The book has been divided into twelve chapters each dealing with a separate subject. We have no doubt that the book will be found useful to all persons having to deal with the subject.

CRIMINAL APPEAL & REVISION by Biswa Nath Banerjea, M.SC., B.L., Advocate, Calcutta. Published by The Law Book Company, Calcutta. Price Rs. 4.

This book collects all the learning connected with the Law and Practice of Criminal Appeals and Revisions. The matter contained in this book can be judged from the fact that the chapters deal with appeals to the Privy Council, to the Federal Court, to the High Court, to the Court of Session and to the District Magistrate. There are also chapters dealing with petitions, grounds and summary dismissal of appeals, the powers of an appellate Court, additional evidence, judgment and bail. There are also the other chapters dealing with references to the High Court, revision, further enquiry and commitment, review, appeal and revision under other Laws, limitation and court-fees. There is also a chapter dealing with *habeas corpus*, *certiorari* and *mandamus*. From the variety of subjects dealt with, it will be agreed that the book will be found helpful to lawyers, magistrates and judges.

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COPY OF A BILL TO AMEND S. 100, CIVIL PROCEDURE CODE, WHICH MR. Q.M.D. AHMED KAZMI (M.L.A.), ALLAHABAD, INTENDS MOVING IN THE CENTRAL LEGISLATIVE ASSEMBLY.

BILL.

Further to amend the Code of Civil Procedure of 1908 for certain purposes.

WHEREAS it is expedient to further amend the Code of Civil Procedure of 1908 for the purposes hereinafter appearing; It is hereby enacted as follows:—

This Act may be called THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT OF 1939.

2. In sub-S. (1), S. 100 of the Code of Civil Procedure after the ground (*c*) add the following:—

" (*d*) the original decree of the trial Court having in appeal been varied, cancelled or reversed:

Provided that a High Court, while hearing a second appeal on any of the grounds (*a*), (*b*) or (*c*) above, may in its discretion determine the correctness or otherwise of the decision on points of fact also if it thinks that the decision of the Court below is erroneous or unjust."

Statement of Objects and Reasons.

S. 100 of the Code of Civil Procedure deals with the grounds of second appeal in civil suits. The grounds given there are as follows:—

(*a*) the decision being contrary to law or to some usage having the force of law,

(*b*) the decision having failed to determine some material issue of law or usage having the force of law,

(*c*) a substantial error or defect in the procedure provided by this Code or any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon merits.

J

This section corresponds to S. 584 of the Code of 1882 and S. 372 of the Code of 1859 with only a slight variation. The first two grounds deal with a mistake of law and the third ground with a mistake of legal procedure, and apparently a mistake of fact does not come in the scheme of this section at all, unless we can bring it in the words "error or defect in the decision of the case upon merits", resulting from the adoption of illegal procedure. It is rightly suggested that this provision of imposing limitations on the grounds that may be taken in second appeal is based on grounds of public policy expressed in the maxim *interest reipublicae ut sit finis litium*,—it concerned the state that there be an end to litigation. But on a perusal of the earlier legislation of the East India Company, it would appear that another and probably the main reason for the original limitation was the curtailment of work before the appellate Court. In the early days of the British Rule there used to be no District Courts of Appeal and only one appeal lay to the Sadar Dewany Adawlat which at the time consisted of the Governor-General and the members of the Supreme Council, who naturally could not be expected to devote much time to work of this kind. The Sadar Dewany Adawlat held its sitting at Calcutta and the distance of the Mufassil Courts from Calcutta was one of the safeguards against the increase of work; the other safeguards adopted was that an appeal was allowed only in respect of properties of large valuation.

The first attempt for providing facilities for appeal was made in 1793, when Provincial Courts of Appeal were established by Regulation V of 1793. Article 1 of this Regulation which can be termed a preamble according to our modern notions says:—

"Parties in suits instituted in the late Courts of Mufassil Dewani Adawlat who considered themselves aggrieved by the decisions of those Courts, had no tribunal to which they could apply themselves but the Sadar Dewani Adawlat, or Court of Appeal at Calcutta."

After this the preamble records that for the facility of the litigant public Provincial Courts of Appeal have been established. The powers of hearing appeals were given to Circuit Judge and the idea of not unduly increasing the work before the Sadar Dewani Adawlat led to the adoption of the rule that second appeals could only be on points of law.

Though later on gradually and with certain variations the Governor-General in Calcutta and the Governors in Madras and Bombay with their Council ceased to constitute the Sadar Dewani Adawlat which came to be presided over by permanent judges and was later on replaced by the High Courts, yet the same old rule about second appeals continues on the Statute Book with certain variations.

On whatever principle we may justify this rule it is intended to be a restriction on the rights of the litigant public and in actual practice it is a restriction on the rights of the High Courts also. After creating a High Court of Judicature for administering justice in the province how can the Government be justified in restricting its power in its administration, and it is an undeniable truth that the High Courts have been compelled to restrict their activities due to this provision of law. In their eagerness to do justice to the litigants the various High Courts have very much reduced the rigour of the provisions of this section of Civil Procedure Code by giving liberal interpretation to clause (*c*) which as pointed out above can be made to cover points of facts as well; yet the struggle has been a serious and continuous one and the British Indian Courts of Justice had to yield to the rigour of the section by holding:—

"The law obviously aims at finality of decision upon questions of fact in cases which do not come up to the High Courts in the first appeal, and I should say that when the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by S. 574 (now O. 41, r. 30) the mere circumstance that the conclusion at which the Court has arrived at are erroneous, or opposed to weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon merits." (Mr. Justice Mahmud in *Nivath Singh* v. *Bhikki Singh*[1].)

These remarks are very significant and show the restrictions on the powers of the High Courts of Justice in India. They were made in connection with a reference which was made to a Full Bench by Petheram, C. J., and Brodhurst, J., of Allahabad. They wanted to know whether the question raised in the two cases before them in the following grounds of appeal could be made the subject of second appeal:—

"(1) Because the lower Court has erred in deciding the case on conjectural grounds and ignoring the whole evidence,

1. (1885) I.L.R. 7 All. 649 (659) (F.B.).

(2) Because the lower Court has erred in reducing the amount covered by the registered bond of 8th December, 1877,

(3) Because the lower Court has assigned no reason for disallowing the item of Rs. 72-15" and "because the lower appellate Court has erred in law in awarding the sum of Rs. 168 compound interest, including other sums not lawfully due by the vendor to the respondent vendee of the share in suit."

Evidently these grounds appear to relate to errors in the determination of facts, and Petheram, C.J., who was a member of the Full Bench, was of this very opinion. He observed:—

"The question raised by this reference is, whether this Court is at liberty, in second appeals, to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly."

Then expressing his own views, he said:

"I am of opinion that the question must be answered in the negative. I am aware that this opinion differs from many rulings of the High Courts in India, and from that of my brother Judges, but as I think the words of the statute are clear, *and that if they are liable to create injustice, the remedy should be applied by the legislature*, I feel it to be my duty to disagree with the many authorities which I have mentioned. S. 585, Civil Procedure Code, provides that no second appeal shall lie except on the grounds mentioned in S. 584, so that the question resolves itself into one of the construction of that section, and of that section alone. There are only three grounds of appeal mentioned in it, and it will be as well to examine them in detail."

Then his Lordship examined these grounds of appeal seriatim, and disposed of the first two grounds as they did not apply to the case. Then he took up the third ground which in the Old Code ran:

"A substantial error or defect in the procedure as prescribed by the Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

Regarding this the Chief Justice observed:—

"Procedure is a perfectly well-known word among lawyers, and means the practice followed by the Courts in the trial of cases which come before them; but, until it became necessary for the purpose of extending second appeals under the Code to questions of fact, *I am not aware that the mental process by which a Judge and jury came to a conclusion on a question of fact was ever called a matter of procedure*, and, in my opinion, it is impossible to fix that meaning to the word."

Then with regard to the case before him he observed:—

"This being my view of S. 584, it of course follows that no question of fact is included in either of them, and it would seem that the intention of legislature was that in small causes the finding of the lower Courts on questions of fact should be absolutely final. . . . ."

Then other Judges of the Bench, however, gave a more extended interpretation to cl. (c) read with S. 574, which enacted that the judgment of the first appellate Court shall

contain 'the reasons of the decision; they said:

"We think that where a lower appellate Court has drawn strained or unreasonable conclusions from evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has perversely interpreted or shut its eyes to proved facts, or has stated no intelligible reasons for arriving at its findings of facts, this Court may take notice of all such matters in second appeal."

Ultimately the Bench justified its opinion by saying:—

"If this Court had not the power in second appeal, we hold it has, to remand a case to the lower appellate Court for the preparation of a legal judgment properly determining the question or questions of fact, we know by experience that great injustice might often be done and it would come to this, —that we should be bound by the mere *ipse dixit* of a lower appellate Court in respect of the issues of fact, no matter how preposterous its findings might be. We cannot believe it was ever intended by the legislature that in such a case there shouldbe an absolute defect of jurisdiction in this Court to examine such findings in second appeal. Our answer to the reference therefore is that the questions raised in S. A. No. 169 of 1884 by the pleas in appeal were questions that might be made the subject of second appeal."

It was in this way that they reconciled to their sense of justice with the word of the section and that continues to be the generally accepted legal view till to-day. In an earlier case reported in *Futtehma Begum* v. *Mohamed Ausur*1, the sense of equity of Mr. Justice Wilson appears to have revolted against such restrictions on the powers of the High Court in second appeal, and without referring to S. 584 he observed:—

"It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower appellate Court; but we are well within the scope of authorities in holding that where the lower appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere."

Thus a way has been found to mete out justice to the litigants in spite of the rather strict language of the section. But it has opened a door to a continuous struggle. It has led to fine distinctions between questions of facts and questions of law and some classes of questions had perforce to be relegated to the region of 'questions of mixed law and fact'. The question of construction of documents of title has led to another difficulty. Construction of documents of title has been held to be a question of law, but construction of documents which support the title is to be considered a question of fact. Questions relating to customs have given High Courts no less trouble. A finding that

1. (1882) I.L.R. 9 Cal. 309.

a certain practice or custom does or does not prevail is regarded as a finding of fact, while the question whether the prevailing practice has the attributes of a legally binding custom is held to be a question of law. In *Municipal Board, Benares* v. *Kandhaiya Lal*[1], their Lordships Banerji, Young and King, JJ., of the Allahabad High Court set aside the finding of the lower appellate Court to the effect:—

"That it is not proved that the practice of zar-i-chaharum ever prevailed in Kucha Champa Shahid."

They observed:

"We think this must be held to be a finding of fact binding upon this Court in second appeal, unless it can be shown that the finding is vitiated by some error of law."

On a close examination of the documentary evidence on the record they remarked:

"The learned Judge was therefore clearly under a misapprehension when he said that the Qabuliats do not refer to the custom. We think the misreading or ignoring of important documentary evidence amounts to substantial error or defect in the procedure within the meaning of S. 100 (1) (*c*), Civil Procedure Code and justifies the Court in reversing the finding if we hold such reversal justified on the merits."

In the end they held:

"*Upon consideration of the whole of the evidence* we think the plaintiff has proved the prevalence of the practice in the locality in question"

and thus set aside the finding of the Court below which at first sight appeared to be only a finding of fact.

Similarly it has been held:—

"Proper effect of proved facts is a question of law, and the meaning of words is a question of fact and their effect is a question of law."

Just as I have said above the rigour of S. 100 has been much smoothened by a liberal interpretation by the High Courts in India. But that is not all. It is also the duty of the legislature to be prepared to review its Acts in the light of experience and it is time that we should try to appreciate the difficulties and remove the handicaps from which the Highest Courts of Justice in India are suffering. The restriction which forces a High Court not to interfere in a case, even when it feels:

"That the conclusions at which the Court has arrived at are erroneous or opposed to weight of evidence—even though such conclusions proceed upon improper conception of the exact effect and bearing of the case upon merits"

does not become the Highest Court of Justice of a country.

1. A.I.R. 1931 All. 499 (S.B.).

It is to meet this need that the present amendment is being moved. Its object is twofold. It gives the High Court full liberty in cases where the lower appellate Court has modified or reversed the decree of the trial Court. In such a case the High Court must be allowed to judge the validity of the judgment for itself on merits. In cases where the two judgments are concurrent and the High Court on hearing the case finds that there has been a serious error of facts also, it must be given discretion to interfere when it thinks fit, and we can safely rely upon the proper exercise of discretion by the Highest Court of Justice in India.

SUMMARY OF ENGLISH CASES.

In re A JUDGMENT-DEBTOR: JUDGMENT-CREDITOR *v.* JUDGMENT-DEBTOR, (1939) 1 Ch. 601.

Bankruptcy—Foreign judgment registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, *S.* (2) 2—*Bankruptcy notice founded on the judgment—Competency.*

Where the judgment-debtor sought to set aside a bankruptcy notice founded on a judgment of a competent Court in France, which had been registered under the Foreign Judgment (Reciprocal Enforcement) Act, 1933, on the ground that the only relief which the holder of the judgment had was by way of execution.

Held, the foreign judgment when registered is in the same position as if it was a final judgment of an English Court for the purposes of bankruptcy notice; and it is not prevented from becoming the basis of a bankruptcy notice.

SHENTON *v.* TYLER, (1939) 1 Ch. 620.

Practice—Discovery—Privilege—If widow entitled to claim in respect of communications during marriage by husband.

Plaintiff sought to administer to the defendant certain interrogatories designed to obtain admissions to the effect that a secret trust in favour of the plaintiff was imposed upon the defendant by her late husband before his death. Defendant objected on the ground that she was not bound to answer questions relating to a communication made to her by her husband. [Simonds, J., upheld the objection. (1939) 1 Ch. 271.] On appeal after discussing the history of the rule,

Held, the only rule that exists is that contained in S. 3 of the Evidence Act of 1853 which in terms relates only to husbands and

wives and you cannot read into the section a reference to widowers or widows or divorced persons. The widow is not entitled to refuse to answer the interrogatories.

In re COWLISHAW: COWLISHAW *v.* COWLISHAW, (1939) 1 Ch. 654.

Will—Bequest of annuity free of all deductions—If annuity payable to be free of income-tax.

A bequest of an annuity to the testator's widow provided that it was to be "paid free of all deductions whatsoever,"

Held, the expression "deductions" must include income-tax and the annuity is payable to the widow free of income-tax.

In re WARREN: PUBLIC TRUSTEE *v.* FLETCHER, (1939) 1 Ch. 684.

Trust Funds—Investments specified by the will—Powers of investment conferred by Statute—Whether prohibited.

The mere provision in a will for investment in a list of specified investments, with no negative provision, did not amount to an express prohibition and the trustee had the powers of investment conferred by statute.

In re MUSCOVITCH, (1939) 1 Ch. 694.

Bankruptcy Rules (1915), *rr.* 132, 385 *and* 386—"*Forthwith*"—*Meaning of—Notice of appeal not sent "forthwith"—If mere irregularity—Power to extend time when to be exercised.*

An appeal against an order suspending discharge in bankruptcy was entered on 25th October, 1938, and the notice of appeal (which under the Bankruptcy Rules, 1915, r. 132, is required to be sent "forthwith" to the Registrar of the Court appealed from) was effected on 28th October, 1938.

Held, the notice was not sent "forthwith" within the meaning of the rule, and it was not a mere irregularity which can be cured under Bankruptcy Act, 1914, S. 147 (1), or under Bankruptcy Rules, r. 385. There were no special circumstances sufficient to enable the Court to extend time under r. 386.

In re FRAME: EDWARDS *v.* TAYLOR, (1939) 1 Ch. 700.

Will—Bequest on 'condition' that legatee adopts testator's daughter—If a trust—Inability of legatee to obtain adoption order—If trust to fail.

A testator bequeathed all his money and insurance policies "on *condition* that the legatee adopted one of the testator's named daughters and gave a sum of £5 each to his other three daughters and son."

Held, the word " condition " is not used in its strict legal sense: It is a gift on condition, in the sense of, on the terms, or on the trust that the legatee does certain things. It imports a trust and though the devisee or legatee dies before the testator, and the gift does not take effect, yet the payments must be made, for it is a trust and no trust fails for want of trustees. So the inability of the legatee to obtain an adoption order cannot allow the trust to fail.

In re WILLS : DULVERTON *v.* MACLEOD, (1939) 1 Ch. 705.

Will—Beneficiaries bringing into hotchpot advances—Interest on advance from testator's death—Liability.

Where an advanced beneficiary has under a clause in the will to bring the capital amount of his advance into hotchpot against his share of the capital of the estate some means must be devised of equalising the position in regard also to the income of the estate, for it would be unfair that the advanced beneficiary should at once enjoy the interest of the sum advanced and be placed in the same position as unadvanced beneficiaries in regard to the income earned by the capital of the estate before distribution. The advanced beneficiaries will be charged with interest at 4 per cent. on their advances from the death of the testator the amount of such advances being determined by the value of the settled securities as at the date of the settlement.

In re DAVID MOSELEY AND SONS, LTD., (1939) 1 Ch. 719.

Company—Provision for retirement of one-third of ordinary directors by rotation.

The articles of association provided that at every annual general meeting one-third of the ordinary directors, or if their number was not a multiple of three, then the nearest number to, but not exceeding, one-third should retire from office (those who had been longest in office to be the ones to retire). When the number of ordinary directors became reduced to two in number,

Held, neither of them was bound to retire under the article.

SUPERMA, LTD. *v.* TENOONI, (1939) 1 Ch. 724.

Patents and Designs Act (1907-1938), *S.* 35—*Action for infringement of patents—Striking out defence and counter-claim for default in discovery—If certificate of validity of patent under S.* 35 *can be granted—R. S. C., O.* 53-*A, r.* 20—*Proceeding to trial—Meaning.*

In an action for infringement of patent, the defence and counter-claim for revocation of the patent were ordered to be struck out owing to the failure of the defendant to comply with an order for delivery of an affidavit of documents. At the trial, the plaintiff

asked for a certificate under S. 35 of the Patents and Designs Act, 1907-1938 of validity of the patent.

Held, as there is only a statement of claim containing allegations which are not disputed (because the defence and counter-claim were struck out) the certificate under S. 35 cannot be given and the case had not proceeded to trial under R.S.C., O. 53, r. 20, and the costs of the issues raised by the particulars of breaches are in the discretion of the Taxing Master.

ADAIR (J.F.) & Co. *v.* BIRNBAUM, (1939) 2 K.B. 149.

Contract—C. I. F. contract for sale of pepper—Contract incorporating Rules of General Produce Brokers' Association—Clause in rules that on seller admitting failure to fulfil the contract the buyer should invoice back and difference in price to be paid in cash—If not a wagering contract—Enforceability.

The rules and conditions of sale of the General Produce Brokers' Association contain, *inter alia*, the following provisions :—" ......(*f*) Whenever it may be admitted by the seller, or decided by arbitration, that the seller has failed to fulfil the terms of the contract, the buyer shall 'close,' by invoicing back the contract to the seller at once, at a price and weight to be fixed by arbitration....... the difference between the contract price and invoicing back price to be paid in cash within seven days;........"

"......If before the maturity of any contract either party liable on the face thereof shall suspend payment, or be a defaulter, or issue a notice convening a meeting of his creditors, or become bankrupt or insolvent, such contract shall thereupon be closed (on 48 hours' previous notice) upon terms to be fixed by arbitration...." In a series of contracts for the sale of a large quantity of pepper incorporating the rules the seller intimated his failure to fulfil the contracts and claimed to have the contracts closed by invoicing back to himself. Also the seller had become insolvent before the maturity of the contract.

Though the Court of Appeal felt that the contracts may be wagering ones they felt bound by the majority view in *Lancaster* v. *Turner & Co., Ltd.*, (1924) 2 K.B. 222 and *Lang* v. *Crude Rubber Washing Co.*, (1912) (since reported in (1939) 2 K.B. 173 as footnote to this case) and

Held, that though the seller was the defaulter the buyer was bound to close by invoicing back the contract to the seller at the price and weight to be fixed by arbitration under r. 9 (*f*) notwithstanding that the seller had become insolvent before the maturity of the contract. Leave to appeal to the House of Lords was given.

ELLIS *v.* RAINE, (1939) 2 K.B. 180.

Fatal Accidents Act, 1846 *and Law Reform Act*, 1934—*Claim for damages by parents for death of child due to negligence of defendants' driver—Award of damages by jury under Fatal Accidents Act only—If retrial to be ordered.*

Where a jury though properly directed awarded to the plaintiffs, the parents of a child of 8 years killed in a motor accident due to the negligence of the defendants' driver, damages only under Fatal Accidents Act, 1846 and nothing for the loss of expectation of life under the Law Reform Act, 1934.

Held, there must be a new trial on the issue of damages. The Fatal Accidents Act deals with pecuniary loss only. If parties who will benefit under the Fatal Accidents Act and Law Reform Act are the same they must not to any extent be allowed to have their damages twice over.

MARRISON *v.* BELL, (1939) 2 K.B. 187.

Master and servant—Sickness of servant—If suspends his right to wages under the contract of service—Receipt of benefit under National Health Insurance during sickness—If affects his right to wages for the period.

Under a contract of service irrespective of the question of the length of notice provided by that contract, wages continue through sickness and incapacity from sickness to do the work contracted for until the contract is terminated by a notice by the employer in accordance with the terms of the contract. The benefits under the National Health Insurance Act is irrespective of the amount of wages as determined by the workman's individual contract of service. So the workman was entitled to recover the wages till the termination of the contract.

Case-law reviewed.

SHIRLAW *v.* SOUTHERN FOUNDRIES, (1939) 2 K.B. 206.

Companies—Contract of employment of Managing Director for 10 *years—Implied term—Alteration of articles giving power to remove director—Exercise of power—Liability of company for breach of contract.*

The S.F. Company agreed by contract of 21st December, 1933, to employ the plaintiff as Managing Director (for which he had to be director also) for ten years and the company could not remove him under the articles of association and defeat the provisions of the contract, which they had power to make. In April, 1936, the company altered its articles which gave power to F.F., Ltd., the second defendants who had acquired financial control of S.F. to remove any director of S.F. company and also provided that an appointment as

managing director should determine if he ceased from any cause to be a director. On 25th March, 1937, the F.F., Ltd., exercised the power to remove the plaintiff from being a director of S.F. and *ipso facto* his managing directorship ceased. In a claim by the plaintiff for damages for breach of contract,

Held (Sir Wilfrid Greene, M.R., dissenting) granted that a company cannot be deprived of its right to alter its articles it is wrong to say that by an alteration the company can put it into the power of some one else to do in relation to an existing contract that which it could not do itself. It must be an implied term of the contract that the company would not so alter its articles as to put it in the power of itself or anyone else to determine the contract. The defendants are liable for damages for breach of contract.

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD, (1939) 2 K.B. 248.

Principal and agent—Fraud committed within agent's ostensible authority—Liability of principal for damages.

The defendant was a solicitor practising in London with a branch office at Slough managed by a clerk who with the help of some forged title deeds induced the plaintiff to advance a loan on a fictitious mortgage. In a claim for damages for the fraud of the defendant's agents,

Held [affirming the decision of Atkinson, J., (1939) 1 K.B. 266] where a fraud is committed within agent's ostensible authority the principal is liable and the rule in *Lloyd* v. *Grace, Smith & Co.*, (1912) A.C. 716, applied.

ROBINSON *v.* STERN, (1939) 2 K.B. 260.

Evidence Act (1938), *S.* 1 (3)—*Statement by defendant to police immediately after accident—Admissibility as evidence in suit for damages for injuries in the accident.*

The defendant who was driving a motor car, immediately after an accident causing injuries to the plaintiff, made a statement to the police. In an action for damages for the injuries, the defendant's statement to the police was admitted in evidence. On appeal,

Held, assuming the statement to have been a document within the meaning of S. 1 (*i*) of the Act the circumstances were such as to make the statement inadmissible by reason of the provisions of sub-S. (3) of that section which provides "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

BAXTER *v.* GAPP & CO., (1939) 2 K.B. 271.

Principal and agent—Estate agent—Gross over-valuation of property by—Mortgage on footing of valuation—Liability of agent for negligence—Damages—Measure of.

In a suit by plaintiff against the defendant for damages for negligence in acting as valuers of property as a result of which the plaintiff in reliance on that valuation advanced money by way of mortgage,

Held, a person who undertakes the duty of valuing property holds himself out as possessing the necessary experience and skill required for the discharge of that duty. Where, by reason of the lack of knowledge and experience, he made a over-valuation of the property, whereby, the plaintiff suffered loss, the plaintiff is entitled to recover the loss which he has sustained owing to the breach of duty, namely, the loss of interest and the loss of his capital. (1938) 4 All.E.R. 457, affirmed.

E. E. & BRIAN SMITH, LTD. *v.* WHEATSHEAF MILLS, LTD., (1939) 2 K.B. 302.

Arbitration—Successive arbitrations under one cause of action—Validity.

A clause in a contract provided that all disputes from time to time arising out of the contract shall be referred to arbitration. The mercantile custom to decide first the question as to whether or not a particular parcel of goods is such that it can be rejected before going into any question of damages which might arise upon the hypothesis that it can be rejected is a convenient one. It is not necessary to have every possible claim before the arbitrators in the first instance. A second claim and arbitration is not barred as the agreement excludes, the rule that all reliefs under one cause of action should be claimed in one proceeding.

NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LTD., (1939) 2 K.B. 317.

Libel—Statement complained of true about existing person of same name as plaintiff—Effect.

Where the writer of an alleged libel has in his mind a person other than the plaintiff and where what he writes is true of that other person the principle laid down in *Hulton & Co.* v. *Jones,* (1910) A.C. 20, is applicable. It does not matter what the writer of a libel means or intends to mean. His meaning is to be discovered from the expressions which he uses and which he puts into permanent form on paper or some such medium.

STIMPSON *v.* PORTSMOUTH CORPORATION, (1939) 2 K.B. 327.

Electricity (Supply) Act (1919), *S.* 16, *as amended in* 1922 *and* 1933 *—Transfer of undertaking—Compensation for loss of employment.*

If as a result of the transfer of an undertaking some one employed by any authorised undertaking can show that he has lost his employment he is entitled to claim compensation.

LONDON PLYWOOD AND TIMBER CO. *v.* NASIC OAK EXTRACT FACTORY AND STEAM SAWMILLS CO., (1939) 2 K.B. 343.

Sale of goods—Delivery of goods contracted for mixed with goods of different description—Buyer's right to reject—Acceptance and appropriation of part of the goods to contract—If affects buyer's right to reject.

Where the sellers delivered to the buyers the goods they contracted to sell mixed with goods of a different description not included in the contract the buyers are entitled to reject the whole. The fact that part of the goods had been accepted by the buyers and appropriated to the contract does not prevent the buyers relying on the right to reject.

CHANT *v.* READ, (1939) 2 K.B. 346.

Married Woman's Property Act (1882), *S.* 12 *and Married Women and Tortfeasors Act* (1935), *S.* 6 (1) (*c*)*—Tort—Negligence—Loss of expectation of life of wife—Claim against husband for contribution by joint tortfeasor—Sustainability.*

A married woman who is killed in a motor collision by reason of the negligence of her husband in driving the car in which she is a passenger has not got vested in her at the date of her death a cause of action against her husband for damages for the loss of her normal expectancy of life. So a claim for contribution against the husband by a joint tortfeasor whom the husband (as his wife's administrator) sued, must fail.

SQUARE *v.* MODEL FARM DAIRIES BOURNEMOUTH, LTD., (1939) 2 K.B. 365.

Sale of goods—Breach of warranty—Fraudulent misrepresentation—Statutory duty—Food and Drugs (Adulteration) Act, 1928 (*c.* 31), *S.* 2*—Breach of—Remedy if restricted to the penalty.*

Certain milk consumed by the plaintiffs (purchaser and his relatives) proved to be contaminated and plaintiffs became ill and suffered serious loss. The plaintiffs claimed damages for misrepresentation, breach of warranty and breach of statutory duty under Food and Drugs (Adulteration) Act, 1928, S. 2. Damages of £400 was awarded on the basis of breach of implied term of contract and there was no appeal regarding it on the other points. On appeal,

Held, there was no misrepresentation: Food and Drugs (Adulteration) Act, 1928, deals with relations of vendor and purchaser and does not give new rights to consumers who are not parties to the contract. Assuming there was an offence under S. 2 of the Act, that has only penal consequences and did not give new rights of action for breach of duty imposed by it.

CLAYDON *v.* SIR LINDSAY PARKINSON, LTD., (1939) 2 K.B. 385.

Master and servant—Employee of a sub-contractor—If entitled to claim damages against head contractor for injuries due to breach of statutory duty owed to his immediate employee.

The employee of a sub-contractor of the defendant a building contractor, had erected a scaffolding which broke under the plaintiffs weight in the course of his work. In an action for damages for injuries by the plaintiff against the head contractors based on a breach of statutory regulation [Building Regulations, 1926, Paras. 1, 4 and 14 (1)] by the defendant in not having a proper scaffolding.

Held, that the statutory duty is one owed by the employer to the workmen he employs and the plaintiff cannot succeed in his claim against the head contractor.

TRIPLEX SAFETY GLASS CO. *v.* LANCEGAYE SAFETY GLASS (1934), LTD., (1939) 2 K.B. 395.

Practice—Discovery—Incriminating interrogatories—Privilege in answering—Company if entitled to.

The plaintiff in a suit for libel and slander against the defendant company and one *L* sought to interrogate both defendants in order to obtain admissions (*a*) that they published defamatory libels, (*b*) that they were actuated by malice, and (*c*) that *L*, "acting on his behalf and on behalf of the defendant company" spoke and published words defamatory of the plaintiff company which had been previously published and subsequently repeated in the libels complained of. The defendants declined to answer on the ground that the answers would tend to incriminate them.

Held, (i) the mere fact that a party or a witness swears that his answers would tend to criminate him is not conclusive and the Court may have a duty, notwithstanding the assertion of a claim of privilege to compel him to answer; (ii) the Court will insist upon an answer if the witness is trifling with the authority of the Court and availing himself of the rule of law to keep back the truth having in reality no ground whatever for claiming the privilege; (iii) the power of the Court to insist on an answer is not limited to a case of *mala fides* but extends to any case in which it is not made to appear to the Court

that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. On the facts it is impossible to say that *L's* objection is *mala fide* and the answer to the interrogatories might tend to criminate him. A limited company may be indicated for libel and the claim of privilege is not limited to natural persons and it could be taken advantage of by a corporation. The defendants were entitled to refuse to answer the interrogatories.

STEVENS *v.* TIRARD, (1939) 2 K.B. 410.

Income-tax—Finance Act (1920), *S.* 21—*Payment of money to wife on condition that she is only bound properly to maintain the children—If money to which child is entitled in his own right.*

By an order of the Divorce Court, the respondent was ordered to pay his wife, who divorced him certain sums in excess of £50 per annum for the maintenance and education of the three children.

Held, that it cannot be said that the child is entitled in his own right to money paid to his guardian for his maintenance. The money is not impressed with a trust but is paid upon condition.

WATKINS *v.* COMMISSIONERS OF INLAND REVENUE, (1939) 2 K.B. 420.

Income-tax—Sums paid by husband annually to make up the deficiency in wife's income for maintenance in a mental institution in pursuance of an undertaking in lunacy proceedings—If annual payment within Finance Act, 1918, *S.* 27—*If income in the hands of the payee or merely expenditure of husband's income—Liability of husband for sur-tax.*

On a case stated by the Commissioners, *held*, that sums paid (in pursuance of an undertaking in lunacy proceedings) by a husband annually to make up deficiency in wife's income for her maintenance in a mental institution, do not fall within the Finance Act, 1918, S. 27 and are merely expenditure of the payer's income and were not proper deductions in arriving at the total income for the purposes of sur-tax. There was no distinction between this and payments under order of the Divorce Court.

In re THE NORTH BUCKS FURNITURE DEPOSITORIES, LTD., (1939) 1 Ch. 690.

Companies—Companies Act, S. 170—*Rating authority in respect of non-payment of rates—If " Creditor " entitled to present winding up petitions.*

Under S. 170 a local authority which is in a position to recover rates is a creditor within the meaning of that section and is therefore entitled to present the petition for winding up of a company.

ANTOFAGASTA (CHILI) AND BOLIVIA RAILWAY CO., LTD. v. SCHRODER, TIRAKS AND WATERHOUSE, (1939) 1 Ch. 732.

Companies—Companies Act (1929), *S.* 75—*Re-issue of debentures—If date of redemption could be postponed.*

The debentures which are re-issued or the debentures which are issued in their place, must contain the same provisions as to redemption as the original debentures which have been redeemed.

JOTTINGS AND CUTTINGS.

Lord Mansfield and the Sailor.—Pepys in his Diary tells us that he was present at a trial at the Guildhall in 1663 concerning the fraud of a merchant adventurer who had sought to make the insurers pay by wrecking his vessel off the French coast. The diarist's comment on the evidence is interesting; he said that "it was pleasant to see what mad sort of testimony the seamen did give, and could not be got to speak in order; and then their terms such as the judge could not understand. And to hear how sillily the counsel and judge would speak as to the terms necessary in the matter; and, above all, a Frenchman that was forced to speak in French and took an English oath he did not understand, and had an interpreter sworn to tell us what he said, which was the best testimony of all." Certainly to an onlooker it must have been a singularly amusing instance of the difficulties arising from the confusion of tongues. But the most dramatic case in which sailor's terminology provided no little amusement was one at which no less distinguished a judge than Lord Mansfield presided. The action arose out of a collision between two vessels—a fruitful source of litigation in the Admiralty Court—and one of the nautical witnesses in the course of his evidence said that at the material time he was standing "abaft the binnacle." With a proper desire to master the facts Lord Mansfield said: "Stay a minute, witness; you say that at the time in question you were standing abaft the binnacle; now tell me where 'abaft the binnacle is'." This question appeared to be too much for the nautical witness, who, it should be mentioned, was said before entering the witness-box to have taken a copious draught of neat rum; so turning round upon the crowded Court with an expression of intense amusement, he exclaimed at the top of his voice: "He's a pretty fellow for a judge. Bless my jolly old eyes"—or words with a stronger implication—"You have got a pretty sort of landlubber for a judge. He wants me to tell him where 'abaft the binnacle' is." The last word, however, was with the judge, who uttered, with great good humour: "Well, my friend, you must fit me for my office by telling me where

'abaft the binnacle' is; you've already shown me the meaning of half-seas over!"—*L.T., 1939, p. 11.*

False Quantities.—It was said that few things caused such real pain to Lord Mansfield as when a member of the Bar pronounced a Latin word with a false quantity. It is told of him that on one occasion a member of the Scots Bar, and those of that body were apparently at that time not so fastidious in this matter as their English confreres, had to make use of the term "curator," and in doing so pronounced it as "curator," which brought down a reproof in these words: "Curators! I wish our countrymen would pay a little more attention to prosody." This in its turn brought forth the witty rejoinder: "My Lord, I can assure you that our countrymen are very proud of your Lordship as the greatest senator and orator of the present age." A somewhat similar story, slightly varied in phraseology, has been told of another judge of Scottish ancestry and a later member of the Scots Bar equally ready in retort. To many it must seem, however, not a little strange that a false quantity in Latin is so heinous in the speaker and so mirth-provoking to the hearer, whereas a similar solecism in English is overlooked as of comparatively no importance.—*L.T., 1939, p. 12.*

Free fight about Flogging.—The hopes of the good women and of the Judges who would keep the "cat" have been revived by the announcement that a free fight is to take place on the floor and in the lobbies of the House on the subject of corporal punishment; while those who would put it out for good are showing symptoms of slight depression. Sir Samuel Hoare, it is said, will appeal to reason, and Mr. Chamberlain will be with him in the belief that flogging does more harm than good. On the other hand, the vote being free, it is thought that Government supporters will not be wholly unimpressed by the conservative women's avowal of faith in the cat's efficacy; while many opposition members will enjoy the novelty of sharing the same opinion and the same lobby with the Secretary of State for Home Affairs. After the Commons, whatever happens therein, will come the Lords.

Mr. Heber Hart has reminded the *Times* of a leader in which it was stated that the only relevant question is whether corporal punishment deters "in such an exceptional degree as to outweigh the obvious objections to it. The considered conclusion of the Departmental Committee, after thorough analysis of the results of experience, is that it does not." Mr. Hart calls attention to the absence of any successful challenge to the reliability of the evidence considered by the Committee, or to the process of reasoning by which they arrived

at their conclusions. "If their Report is incontrovertible, should not the opposition to its recommendations cease?"—*L.J., 1939, p. 12.*

Tit for Tat or Homœopathy?—Writing merely as "Outlaw," I should say that the opposition should cease, but that it will not; and that until their favourite is dead and buried they will go on fighting for its survival. Perhaps the strongest evidence of the unselfish devotion of some of them is this: that while frankly admitting and declaring that early floggings and canings have made them what they are, they still believe the cat is an influence for good.

As the opposing parties stand in battle array the *casus belli* is not that Sir Samuel Hoare and his people do not abhor with detestation equal to that of his opponents the sort of crime which may now be punished by flogging. Nor is it, so far as one may judge from the arguments thus far used in the controversy, that the cat o' nine tails has proved a deterrent to any noticeable degree in the past. The profloggers feel, however, that it ought to, really; and, anyhow, that it is the only stuff to give the kind of rotters who commit the filthy kinds of violence for which they would apply it. "Give 'em", they say in effect, "a taste of their own medicine, the only punishment such low fellows can appreciate."

"The crime is indeed beastly," say the others, "but your punishment is beastly, too; it tends to make you so, irrespective of its effect on the criminal and the unfortunate executioner. Demonstrably it does not deter (see Report)."

In Mr. Hart's words:

"Where punishment is accorded not merely for the protection of society or the reformation of the criminal, but is retaliatory, vindictive, or retributive in character, it becomes necessarily demoralising to those who administer it, and to those who are responsible for its infliction. As soon, therefore, as a penalty which involves acute bodily suffering is found, in fact, not to be specially deterrent, and, accordingly, not to be necessary, the evil of its retention as a feature of our penal system becomes apparent."—*L.J., 1939, p. 12.*

Corporal punishment for Women.—Old ideas do give place to new, even on such matters as corporal punishment. Time was when a husband could lawfully administer it to his wife; and wives, according to some authorities, are not substantially worse than they were.

It was in the present century that Grantham, J., on the South-Eastern Circuit, offered advice from the Bench to husbands who were unfortunate enough to find their domestic peace disturbed.

"The prisoner," he said, "was justified in believing that his wife had formed an unholy affection for another man. If he had

contented himself with boxing her ears it would only have served her right, for her conduct was enough to drive any man out of his mind." Soon afterwards there appeared in the press a protest from Lady Harberton, who said that "assaults on women are already far too common, without a Judge on the Bench going out of his way to counsel an utterly illegal act," and called upon Grantham, J., promptly to undo the mischief which the publication of his views on the adjustment of matrimonial disputes would infallibly bring about. —*L.J., 1939, p. 12.*

Ancient rights:—In that book of ancient fundamental truths of the common law, Matthew Bacon's *New Abridgment of the Law*, is set out the contemporary learning on the mutual relations of husband and wife.

"The husband," he wrote, "hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner; for, in such case, or if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by suing a writ of 'supplicavit' out of Chancery; or may apply to the Spiritual Court for a divorce '*propter sævitiam*'."

This power of judicious corporal punishment in time of need was whittled down, principally and not unnaturally, during the reign of Queen Victoria. The sayings in Bacon's *Abridgment* became things of the past, and could no longer be cited as a binding authority in the Courts of the Law. Lord Halsbury, when the passage aforesaid was read to him by hopeful counsel, was moved to scorn. "Such quaint and absurd dicta," said he, "as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not now capable of being cited as authorities in this or any civilised country."

That some wives may be very cruel, and that their husbands may not lawfully beat them, is known in every police court. Is it that the Conservative women still believe, regarding very bad men, that "the more you beat 'em the better they be"?—*L.J., 1939, p. 12.*

The Lord Chancellor on the Rule of Law.—Responding to the toast of His Majesty's Judges at the customary dinner given by the Lord Mayor to members of the judiciary on Tuesday, Lord Maugham, L.C., referred to a number of legal changes and appointments during the past year, and recalled that he had set up a number of important committees which included subjects of such diversity as law reporting, poor persons rules, the law of defamation and shorthand notes in Court; and he expressed the hope that when he received the reports

it would be possible to bring about some much needed reform. He emphasised the fact that the subjects of the King, whether residing in this country or beyond the seas, lived under the dominion of law. Our true liberties could not be interfered with except by due process of law. But it was not only on good laws that our peace and tranquillity depended. It was necessary also that they should be well administered, and this was all the more essential in such a far extending empire as ours. In many lands where British justice was administered there was the same equal justice for rich and poor, white and coloured, educated and ignorant, civilised and savage. The Lord Chancellor gave instances of what he was saying, and concluded by observing that the judges and the lawyers from the highest to the humblest throughout the empire had in this matter a single philosophy and a single creed. They stood for the ancient traditions of law and justice. Those were the ultimate reasons for their existence and they must of necessity make every effort and every sacrifice to retain those traditions unimpaired.—*S. J.*, *1939, p. 533.*

The Lord Chief Justice.—On the same occasion Lord Hewart, C.J., alluded to the despatch of legal business. There was no time, he said, when the work of the judges was greater in volume, or more punctually performed. There were people who applied the term arrears to every case set down, and who thought the whole body of cases must somehow be immediately and simultaneously tried the moment each came into existence. Perhaps that system would flourish in that happy time, fraught with untold blessings for solicitors, barristers, juries and the public, when every court would sit all the year round, seven days a week, twenty-four hours a day. Meanwhile judges would continue to the best of their ability to discharge their task steadily, vigilantly, and courageously.—*S. J.*, *1939, p. 533.*

The Week's Personality.—In 1835, Chief Justice Marshall breathed his last without pain, his mind as clear and strong as ever. One who was present tells how he "met his fate with the fortitude of a philosopher and the resignation of a Christian." The last thing taken from his body was a locket which three and a half years before his beloved wife had hung about his neck just before she died. Her loss had left him a changed man and he had never recovered from it. Old memories must have filled his mind as he lay expiring in philadelphia, for nearly sixty years earlier, as a lieutenant in the armies raised to assert American independence, he had marched through the city on the road from Valley Forge to Monmouth. It was in 1801 that he was appointed Chief Justice. The defective organisation of the

Supreme Court had brought its dignity to a very low ebb, but that extraordinary ability, that courage, that unswerving impartiality, that absolute control of nerves and temper which made him one of the greatest men of his country enabled him to confer on it a high prestige. All America felt that his place could never be supplied as it honoured " the Soldier, the Orator, the Patriot, the Statesman, the Jurist, and, above all, the good and virtuous man."—*S. J., 1939, p. 541.*

Horse Guards' Right of Way.—A recent note in a newspaper pointed out that passage under the Horse Guards arch is not a royal prerogative, though it is permitted to so few people that it has come to be so regarded by the layman. The select few are rather arbitrarily chosen and this once gave Sir Frank Lockwood an opening for one of his jokes. One morning he rode across the Horse Guards Parade to Parliament Street. On being stopped by the sentry he weightily informed him that he was " one of Her Majesty's Counsel." This so took the man by surprise that he at once apologised and let Lockwood through, saluted by the guard. No embarrassing sequel followed as on the earlier occasion when Lord Brougham had driven through in his coach on the way to a Drawing Room at the Palace. The officer of the guard, having stopped the Lord Chancellor, tried to explain to him the delicate distinction which allowed the Speaker of the Commons to go that way but not the Speaker of the Lords. Brougham duly gave orders for the coach to turn back, but owing to a misunderstanding the coachman whipped up his horses and drove into the Park. Questions were afterwards asked in the House of Lords as to whether the King's Guard had been forced by the Lord Chancellor, and Brougham, complaining bitterly of being thus " put on trial on the Woolsack," explained what had happened.—*S. J., 1939, p. 541.*

The Same for Rich and Poor.—That there was an enlightened Magistrate in the Mansion House 100 years ago, who realised that the " same law " for rich and poor was not quite equal, appears from a report reprinted in the *Times*. For the like offence should there not be a graduated scale of fines, in accordance with the income and super-tax assessment of the wrongdoer ?

" A man of very respectable appearance, named Priestley, of Hyde Street, Bloomsbury, a descendant, we understood, of Dr. Priestley was brought up (at the Mansion House) charged with having been blind drunk in a cab........ The Inspector said that in a private pocket of the drunken gentleman the person who took his clothes to be cleaned found 140*l.* in bank-notes and a bundle of railway shares.

Defendant : It is quite true, I had the property about me.

Sir P. Laurie : It was well you fell into the hands of our police; if you had not probably you would have lost all the money.

Defendant : I should have deserved it for allowing myself to be led to drink myself into such a brute........

Sir P. Laurie : I believe that the Magistrates will soon have the power of sending drunkards to prison for seven days for each detected offence of the kind. It is too hard that a rich man, to whom this fine of 5*s*. is nothing, should be punished in no other way, while the poor man, to whom that sum is a great deal, should be subjected to the same penalty. Take care of a week's imprisonment.

Defendant : I never will drink again.

Sir P. Laurie : Very well; pay the penalty, and pay the cabman and the police for taking care of you."—*S. J., 1939, p. 32.*

Lord Chancellor Chelmsford.—In the course of his recent miscellaneous reading the present writer has met with various references to Lord Chelmsford which greatly interested him and piqued his curiosity to know more regarding him and his career, which began in the Navy but was soon transferred to the law, in which he was destined to rise to the highest position it can offer to its votaries. At the same time, the writer was much struck in reading the notice of this famous lawyer in the pages of the Dictionary of National Biography to observe the small space allotted to him—three columns—although the contributor was no less distinguished a writer than the late Lord Sumner, at that time merely J. A. Hamilton, as compared with the space devoted to another distinguished man some pages earlier in the same volume, namely, William Makepeace Thackeray, who is given no less than twenty-nine columns. We may leave the nice question as to these relative appraisements and be content to follow in imagination the career of Frederick Thesiger, who was eventually to be ennobled as Lord Chelmsford.—*L. T., 1939, p. 29.*

Lawyer and Wit.—Thesiger's legal youth was spent in the chambers of George Sowley Holroyd, who later became a Judge of the King's Bench, and who apparently was able to indoctrinate his pupil to some purpose. According to his own memoranda, the pupil was exceedingly diligent in his studies, regaling himself on such appetising fare as Fearne on Contingent Remainders and Shepherd's Touchstone, and other equally fascinating volumes. Called to the Bar in 1818, he joined the Home Circuit, of which he was to become the life and soul, delighting all with his wit, except, perhaps, those who were its occasional victims. Serjeant Robinson, who belonged to the same circuit, tells us in his chatty volume that of the jokes that passed among its members, if it was respectable it was attributed to Thesiger,

whereas if it was not sufficiently clothed it was fathered upon Serjeant Murphy, while if it savoured of conceit or self-complacency Samuel Warren was sure to become the recipient. At Warren Thesiger appears to have loved to poke his fun, as, for example, on the occasion when Warren, in boasting of his intimacy with members of the peerage, mentioned that while dining lately at the Duke of Leeds, he was surprised at finding no fish of any kind served. "That," interposed Thesiger, "is easily accounted for. They had probably eaten it all upstairs"!—*L. T., 1939, p. 29.*

BOOK REVIEWS.

THE INDIAN INCOME-TAX ACT by Mr. A. N. Iyer, Advocate. Published by The Company Law Institute, Thiagarajanagar, Madras. 1939 Edn. Price Rs. 15 per set.

Mr. A. N. Aiyar is so well known to the public as the Editor of the "Federal Law Journal of India", "Company Cases" and "Income-tax Reports" that he needs no introduction from us. We are in receipt of his "Commentaries on the Indian Income-tax Act, 1922" published in two volumes. The first volume covers nearly 600 pages and has a neat introduction appended to it explaining in a short compass the changes introduced by the Amendment Act of 1939. In the first volume the Amending Act of 1939 is given separately and next the Income-tax Act of 1922 as amended by the Act of 1939 is given. The amendments are printed in italics for easy reference. The Enquiry Committee Report, a summary of the abstracts of proceedings of the Legislative Assembly and the Council of State, and the report of the Select Committee are also printed. It is in the second volume that we get a neat commentary on the sections of the Act running to about 730 pages and fairly full extracts of the Proceedings of the Legislative Assembly and the Council of State. The rules made by the Central Board of Revenue in exercise of the power given to it under S. 59 are also given, so that the compilation of Mr. A. N. Iyer is full and complete. The commentaries also are carefully written under appropriate headings and the case-law has been well digested and brought up-to-date. We do not find much of the editor's own views on points where there is a conflict in the case-law; but the conflict is well analysed and presented. But considering the hurry with which the book had to be published to serve the immediate need of the profession, one could not expect the author to have the leisure to indicate his own views. We have no doubt that very soon another edition will come up and that there the author will indicate his considered opinions on such conflicts. The get up of the book is good and the type also bold.

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LAW AS AN INSTRUMENT AND MEASURE OF SOCIAL PROGRESS.*

My initial duty is to convey to the authorities of the University my profound thanks for extending to me the invitation to deliver this lecture under a foundation associated with the name of a great ruler respected thoughout the whole of India. Though the stress and strain of professional work and my official duties leave me very little time for the pursuit of an academic study of law, I have hazarded this undertaking mainly because I have come more and more to realise the need for the approach of the study of law from a sociological point of view and the need to impress upon my younger friends in the profession the importance of such a study. In delivering the address on the topic of Law as an instrument and measure of social progress, I need hardly say I make no pretensions to any originality as my lecture is largely based upon a study of the leading writers on Jurisprudence and legislation and such experience as I have gathered in the practice of the profession. In the short time at my disposal I can only touch on the fringe of many a topic calling for a detailed and fuller treatment. If to the student of zoology the growth of life in different forms is of absorbing interest, if to the sociologist the development of society from rudimentary beginnings has a fascination and if the growth of the nation State, the need for the federation of communities and the growth of international unions make a powerful appeal to the student of history and politics, the inter-relation between law and society—law stimulating and bettering the growth of civic society and individual life and a changing society in its turn shaping legal institutions—has a peculiar attraction for the lawyer and a student of historical jurispru-

* The Sri Krishnarajendra Silver Jubilee Lecture, 1939 delivered by Sir Alladi Krishnaswami Aiyar, Advocate-General, Madras.

dence. The legal world is under an immeasurable debt of gratitude to the great analytical, historical and sociological jurists who have rendered incalculable service in the promotion of a scientific knowledge of the subject. The one important lesson that is learnt by the lawyer in the course of his studies is that the source of all law is to be found in the seething life of the people, that the course of legal development is determined by the progress attained by the nation in the several spheres and that the legal system in its turn has shaped progress. While law may, to some extent, be the result of the sociological forces operating in any civilized society, it is beginning to be realised more and more that social progress may also be controlled and regulated, and law can be made a more efficient instrument for individual and social well-being, through conscious effort. It is a familiar experience to every lawyer that sometimes a new rule of law enunciated by a Court may work a thorough metamorphosis and give a new direction to social progress even to the extent a scientific invention may sometimes make and has made a new world of our planet. Decisions of Courts have set standards as to the degree of care required in dealing with one's own property and the degree of care required of a person to whom the management of another's property is entrusted, as to the point of approach in dealing with, say, the problem of contributory negligence, as to what constitutes an actionable nuisance in the changed conditions of town and country life, as to the limits of liability of corporate and public bodies for nonfeasance and misfeasance and even as to the standard of honour required in the pursuit of a profession. Is there any doubt that in the approach to such questions the Court is to take into account the social forces at work at a given time? The standards themselves are variable in their nature and content. The development of the law of wrongs in the complex conditions of modern society is a striking illustration of the working of the above rule. Social dynamics is not a constant factor, as the principles of reason, morality and social utility, on which all law rests, can no more be static than society itself. As recent decisions have shown, even such a question as the liability, say, of a hospital authority for the negligence of a surgeon employed in a hospital under public control cannot be decided as an abstract legal question. It is largely the balancing of social considerations that will determine the issue whether the proper

analogy to be applied to the case is that of the liability of a master for the wrongs of his servants or that of a public authority whose only duty is to choose a skilled doctor. The hardening of institutions into a shell, as Bagehot and Maine have illustrated, is the greatest hindrance to life. The functional approach to the study of legal problems has received special attention in America in recent times. Maitland and Holmes—two of the greatest names in Anglo-American Jurisprudence—owe not a little of their juristic eminence to the sociological method of approach to legal problems. In his book on "The Nature of Judicial Process" Justice Cardozo has also described the great transformation in the legal view of property and liberty in the latter part of the 19th century and more so in postwar Europe and America and the reactions of the sociological school of jurisprudence to the changed conceptions of property and rights. In the process of adjusting law to the changing conditions of society or of law shaping and helping social change, there is bound to be frequent maladjustment as the law of social dynamics cannot by its very nature be exact.

With your leave may I attempt a very brief survey of the history of law and legal institutions from this standpoint? One may start with the traditional sources of law according to the classification of jurists in the pre-legislative period—custom, *responsa prudentum* of jurists, and judicial precedent. Without going into the academic controversy connected with the nature of customary law, whether custom had its origin even prior to the evolution of the modern State, whether customary law is traceable to the practices of the elite or the select section of the people and was unconsciously adopted by the rest, whether in the later stages of its growth it had a sanction of its own or whether its sanction as law depended on the enforcement by the duly constituted tribunals in the State, there can be no doubt that customary law, while it may have a sociological origin, has been largely shaped by jurists and judges—it may be by jurists under the ancient Roman and Hindu Law; it may be by judges under the English system of jurisprudence. The skilled interpreter has largely moulded customary law, much like a potter moulding clay or any plastic material in his hand. That does not of course involve that the interpreter is working in a vacuum. He has necessarily to work in the surrounding atmosphere and with the material that is available. At the minimum he gives a new

direction to the forces at work. There may be no difficulty in tracing what may be termed 'a rule of customary law' to the influence of a jurist or a particular judge. One cannot pass over this topic without alluding to the great part played by the commentators in Hindu Jurisprudence.

It does not require a deep knowledge of Sanskrit literature to realise the great changes effected in the law of the Smritis by the commentators. Even a cursory perusal of the different commentaries in the available translations will convince a reader of the dexterous skill displayed by the interpreters in moulding law and custom to suit the tendencies of the age and of the particular tract of country to which a law has to be applied. The result may have been achieved in various ways—sometimes by insistence on a literal reading of the original Smriti text, sometimes by emphasising the religious principle involved in a particular rule, and sometimes by the very opposite process of stressing the secular aspect of the right involved. It not infrequently happens that the whole conclusion of the commentator occasionally rests upon a philological dissection of an ancient Sanskrit verse or text. Who can ever decide the extent to which the commentator was influenced by the social forces at work in the particular age or how the social tendencies were in their turn moulded and given shape to by the ingenuity of the commentator. Those were days when the springs of civilized life were in active operation in Hindu society and were not dried up.

I shall now take up the second main source *viz*. judge-made law. The most forcible and erudite exposition of this topic is found in Professor Allen's book on "Law in the making." In English jurisprudence, the judge occupies very much the same place, as has been frequently pointed out, as the professional jurist in the early history of Roman jurisprudence and the commentator in the Hindu system. The English law, as is well known, is largely judge-made law and in the field of what may be termed "private and personal law," continues to be so even at the present day, excepting to the extent modified by recent statutes, as a result of the labours of the Law reform committee; constituted with a view to remove certain anachronisms and anomalies of English law entirely out of tune with modern conditions. While the English system of jurisprudence has been the theme of unstinted and incessant praise generally by

English lawyers, it is common knowledge that it has been subjected to a good deal of adverse criticism not merely by foreign jurists but by the reforming school in England from the days of Jeremy Bentham. On the one hand it is urged with a feeling of pride that the English system stands as a vindication of the pre-eminent and rooted sense of justice of Englishmen and that it has stood the great changes in English society after the Industrial Revolution and even in the post-war period. On the other hand, the defects of the English system have been catalogued with equal vehemence and earnestness. One chief characteristic of the English system is the binding character of precedents, graded according to the relative position occupied by the Courts in the judicial hierarchy, though, as is pointed out by Professor Allen, it did not become an established principle of English law, until about the middle of the 19th century, and was not so even during the days of Lord Mansfield. The most interesting question for a student of legal institutions is how the elasticity of the law has been maintained, consistent with the principle as to the binding nature of a judicial precedent, and how English law has been moulded by the judges to suit the needs of a growing and expanding civilization. Sir Frederic Pollock did not make an exaggerated claim for the Common law when he stated that it was capable of growing to the demands of the new times and circumstances, and that its conclusions in detail were not dogmas but flexible applications of living and expanding principles. The theory of the binding nature of judicial precedents has been got over in countries permeated by English jurisprudence, as every practising lawyer knows, by recourse to various expedients, by the rule that an *obiter dictum* is not binding but only its ratio, by limiting the scope of the decision to the facts in the particular case, by curtailing the operation and scope of a decision as a result of a meticulous examination of its content and reasoning, by the enunciation of the principle that a case is an authority for the actual point decided, by grading the relative authority of particular tribunals and sometimes by the rule that a decision must be reported in certain authorised publications, and so on and so on. The history of English law for the last 50 years and over has shown that these methods have not ceased to be unsuccessful and still continue to be fruitful, and that in spite of a vast growth of precedents, there is still room for judicial expansion.

of the law and the formulation of new principles. Nowhere is this tendency more noticeable than in the recent developments in the law of torts and also in certain departments of the law of contracts. The law as to public bodies and the law of conspiracy in its different aspects have opened up a new chapter in English law. Even on such a subject as the liability of a seller for the quality of the articles sold not merely to the immediate buyer but to successive buyers, there has been a vital change consequent on the present day conditions of modern society and the rapid passing of an article from hand to hand. An accepted theory like a corporation under the English law being a juristic personality is undergoing a change for some purposes. In the region of Income-tax law, in dealing with Foreign corporations under certain circumstances, there is an attempt to break through the conception of the theory of the juristic personality of a corporation for all purposes.

Without in any way minimising the claims made by English lawyers, one may easily group the apparent disadvantages. Under the English system, a wrong principle enunciated a hundred years ago in what may be termed a chance decision without any regard to principle or without any ratiocination may easily entrench itself as not being open to attack. The rule as to the doctrine of common employment is a glaring instance in point, though the other day the House of Lords, reversing a decision of the Court of Appeal, circumscribed the doctrine within the narrowest limit with due regard to the changed conditions in modern industry and the absence of any kind of link between an employee in one sphere and an employee in another sphere of a large business organisation. There are other stereotyped rules of a similar character which have no essential basis in the fundamental principles of justice and fair play. Compare (1) the rule as to *actio personalis*, (2) the law relating to married women, (3) the doctrine relating to common employment, and (4) the rights of third parties to contracts.

Some of these archaic principles have either been totally abrogated or modified by recent legislation.

Again, whereas certainty is the very soul of law, the English system may easily lead to an uncertainty in the determination of law, necessitating as it does a trained practitioner to wade through a whole mass of Case-law to ascertain a simple rule of

law or conduct it may be. It has also been urged against the English system that of necessity it makes the administration of justice a most expensive affair to the litigant whereas the pre-eminent consideration to be borne in mind in regard to any legal system is the expeditious and cheap remedy it affords for the redress of wrongs. The criticism has also been expressed by Professor Laski and others of his school—a criticism in which I do not share—that the judiciary in England, while maintaining a high standard of independence, has not been altogether free at any rate from unconscious class bias, due, it may be, to the recruitment of the judiciary from the middle and the higher classes trained in particular schools of thought. The decisions on the Workmen's Compensation Act and on Trade Union Law are instances cited in support of this criticism.

Without going into the merits of the criticisms against the system of judge-made law, it may be of interest to note that the discontent with the existing judicial technique, a dissatisfaction of being tied to judicial precedents and a growing impatience with the existing order, have led to the rise of a new school, especially in America, the jurisprudence of which is similar to the English jurisprudence. The main theme of this school is to free law from the trammels of judicial precedents, the cardinal principle of this school being that the proper functioning of a rule is its only title deed to recognition and nothing else. It is impossible to subscribe in its entirety to the views of this school as that may lead to a sacrifice of all rules of certainty and would leave the fate of litigants entirely in the hands of an individual Judge or Judges. Some of the greatest American Judges in recent times, such as Holmes, Cardozo, Brandies and Jurists like Maitland in England have been largely influenced by this school, though they would not subscribe to the extreme view of countenancing a law for each case. Without sacrificing the rule as to certainty being a cardinal principle in the administration of justice and conceding that a precedent is a starting point to work from, these jurists are for the highest Court in the land at any rate abrogating a principle when the same is unsuited to the times or when a precedent is proved to be radically unsound and indefensible. The theory of the absolute in law has no attraction for these jurists. If a Judge cannot consciously assume the role of a legislator, neither can he consciously or unconsciously ally himself to a particular economic

or social order and arrest the growing currents of active social life. It may be of interest to note that there is nothing very surprising in the attitude of this school or even of the realist school, if only one remembers, as is pointed out by Professor Frankfurter now Mr. Justice Frankfurter in his recent book on Holmes, the work of Lord Mansfield in the formative period of English commercial law. As he says there is high authority to support the view that Lord Mansfield in assimilating the long-established custom of merchants into English commercial law wrought havoc with symmetry: "He earned no doubt the reputation of being dangerous to the kingdom but imbued the Common law with a vitality for which it has reason to be grateful."

While on the subject of judge-made law I have not alluded to the part played by the judiciary in the shaping of the federal constitution or the multiple State. A federal system necessarily involves the institution of a complicated machinery of government which demands the most delicate and flexible adjustment for harmonising the interests of national and provincial or State governments. Federalism itself is a form of government of varying content. In the delicate task of constitutional adjustment, the Courts under the British and American systems, even if not under certain Continental constitutions, have a very important part to play. The best illustration of this statement is found in the American system on account of the long history of the American democracy. One need not wade through the maze of sometimes apparently conflicting decisions of the Supreme Court of the United States, say, on the commerce and the due process clause of the American constitution to come to a conclusion that the delicate task of harmonising national and State interests, of individual liberty and the rightful sphere of the intervention of government has, on the whole, in the different periods of history, been discharged in a unique manner by the Court, criticisms to the contrary notwithstanding. In the hands of the Court: "the constitution has become a plastic instrument to be adapted to a growing nationalism." As a recent writer puts it, "the constitutional document has been in the various pronouncements of the Court examined as critically and minutely as though it were verbally inspired." "No doctrinal confession in a church has suffered such a metamorphosis in meaning combined with an unimpaired respect for

the letter as the fundamental law of the American constitution." In the result, a constitution which was designed when it was framed to serve the interests of an agricultural country with a population of 3 millions has wonderfully reacted to the changed conditions of American democracy in an industrial epoch and to an age which is profoundly affecting the relationship between the State and the individual and *vice versa*. That is a great tribute both to the fathers of the American constitution and to the work of the American judiciary. It looked as if the other day during the post-war economic crisis the constitution was about to give way but the catastrophe has been averted and there has been a fresh accession of strength to the Supreme Court.

In evaluating the work of the Court, it is not as if I have not taken into account the criticisms that have been levelled against its work, its oscillations of opinion with a change of personnel in the Court, its sometimes ranging itself, as it is stated, with the forces of reaction, sometimes appearing to espouse American nationalism and sometimes state particularism, but giving full weight to these criticisms the verdict has to be on the whole in favour of the Court, which has functioned for nearly a century and a half and the claim made by President Wilson that the fundamental instrument is in the nature of a tap root from which has grown a constitutional system is largely due to the work of the Court. Similar influence of judicial interpretation is seen in the evolution of Dominion constitutions. Though the Judicial Committee has not subscribed to certain rules of interpretation which the Supreme Court of the United States has laid down, it is common knowledge that, as a result of the interpretation put by the Judicial Committee on the British North America Act, the constitution of Canada to-day has assumed in several respects a form different from what was expected or intended at the time. If to-day the Canadian Provincial Governments are not merely local governmental units but are in the position of States exercising what may be termed sovereign functions for this purpose, it is not a little due to the decisions of the Judicial Committee. Owing largely to the growth of nationalist feeling in Canada and a sense of its new-born status under the Statute of Westminster and the recent developments in Dominion autonomy, discontent has been expressed in several quarters with some of the decisions of

the Judicial Committee. But that does not in any way affect the substance of my remarks.

Similar observations apply to the work of the High Court of Australia which is the final Court of Appeal in constitutional matters except when special leave is granted by the High Court which is seldom given. As a result of the work of the High Court of Australia, the constitutional balance has shifted from the States to the Centre in several respects contrary to the expectations of those concerned in the framing of the constitution. The diffusion of political power in a federal state is a major issue of politics at the present day, which may render a large scale economic reform difficult, if the Centre and the Provinces in India do not work in harmony with a single eye to national prosperity and consolidation. At the same time, as is pointed out in a recent book, federalism may afford a guarantee against the emergence of the totalitarian State. The success of a federal scheme, as I have already pointed out, would, to a very large extent, depend upon a co-operation between the Centre and the units, the prevention of unhealthy rivalry among the units themselves and the vesting of an overriding power in a responsible national government at the Centre in times of emergency.

By far the most important source of law in the present era is legislation. An ever increasing legislative activity is a special feature of the modern State, whatever be the form of government obtaining in the particular polity. According to a recent estimate, the output of legislation in the post-war period in England exceeds the output of legislation in the 19th century, and is far in excess of the legislative activity of the State in the centuries that preceded it. It is a common place of politics to state that the political ideal of the age and the prevalent social and economic tendencies give the necessary direction to the course of legislation. While it is true that in Europe the introduction of democratic government was, in the early stages, strangely enough, followed up by an emphasis upon the doctrine of laissez-faire in politics, very soon it came to be realised that laissez-faire could not be a sound working rule in a democratic polity, as, naturally, the enfranchised masses began to press for the betterment of their social and economic conditions. The movement towards social amelioration is a necessary concomitant of the democratic movement. In spite of the fact that English

democracy is averse to effecting any convulsive changes in society, it is common knowledge that there has been "path-breaking" industrial legislation in England which made her the pioneer of industrial law, whose example has been followed in every other country. Even a cursory glance at the statute-book will reveal that legislation regulating the conduct of industry and agriculture is expanding enormously in volume and growing in complexity, and, in accordance with modern trends, there are a large number of statutes modifying in various degrees freedom of contract. As the Lord Chief Justice of England put it in a recent case, referring to the Factory and Workshop Acts, "A large purpose of these statutes was to save workmen from themselves." There is no school of politics which does not recognise at the present day the right of the State to intervene to regulate competition, to prevent exploitation, and to exercise control over working conditions. Even avowed exponents of individual liberty and property have come to realise the need for "the State checking the blind results upon the many, of economic actions which are undertaken for gain by the few, and the legitimacy of the demand for a strong government to control economic forces with the object of giving the many, economic security." A recognition of the growing functions of the State and of the regulation of economic conditions as a part of the accepted philosophy of government necessarily lead to the devolution of governmental functions upon administrative bodies and agencies under the authority of Government created for the purpose. This delegation, as is pointed out by Mr. Wade in his recent edition of Dicey, is not confined to government departments but extends to numerous statutory departments which cannot be regarded as departments of State directly responsible to the legislature.

In spite of the criticisms levelled against administrative and legislative delegation, the report of the Donoughmore Committee reveals that recent tendencies in legislative methods are inevitable and are bound to grow. All that can be expected is to give a proper direction to such methods and practices. In regard to administrative bodies exercising quasi-judicial functions, while the highest court in the land has necessarily to exercise a restraining influence to see that these bodies do not overstep their jurisdiction in the interests of sound and efficient administration, the bodies themselves will have to be given a latitude and

freedom of action without any sacrifice of the fundamental principles of justice. While legislation in any modern State necessarily involves a certain degree of interference with even what may be termed 'liberty of person' in the larger sense of that expression, care has to be taken that the foundations of such liberty are not sapped.

Even the United States, whose constitution is based on the 18th century notions of individual property and sanctity of contract, have not been able to resist the tendencies of the age. The New Deal legislation has been actuated by the guiding principle of a pervasive governmental interference with all branches of private business. The legislative activity of the State has invaded every sphere—the reduction of private debt under the moratorium legislation, the inflation of currency, the banking system, and agricultural and industrial production. The need has been recognised for finding a rational compromise between individual rights, and public welfare, the security of the State being placed by every section of political opinion above the security of vested rights. There is an increasing realisation of the necessity of the laws being every day adjusted to a new environment and even the constitution being so interpreted as to meet economic realities.

The growing tendencies in England cannot but have their reactions on the Indian scheme of government. In spite of the essentially individualistic and family basis of Indian social organisation and the village-community system of local Government, from very early times, the State in India has taken upon itself the functions assumed by the modern State in European countries. In illustration of the above statement, I would only refer to such matters as irrigation, control of communal property, forests, and regulation of land revenue. Legislative interference for regulating and adjusting the different interests which have grown up in the land in the course of centuries has been a special feature of British Indian Administration. The democratic legislatures of India under the new constitution are confronted with the problem of large-scale legislation in regard to these matters. While the interests of agriculture, as the staple source of living for the large mass of people in this country, will have to be safeguarded and fostered, and while every effort has to be made also to help the cottage industries in villages and in the suburbs of towns, this country cannot be expected to keep pace

with the civilized world, sustain its growing population and ensure a proper standard of living for it, unless every endeavour is made to help large-scale industrial enterprise of various kinds. A large-scale industry in industrial centres cannot but bring in its train the problem of adjustment of the relations between capital and labour according to modern ideas, the prevention of overcrowding and the ensuring of sanitary surroundings. The task before the legislator dealing with industrial problems is how to harmonise the interests of capital and labour and secure a fair deal for the labourer without destroying initiative and enterprise. In the process, the key industries of the country must necessarily come under the control of the State, if not under its direct management.

Meanwhile, the constitution itself is in the melting pot and the determination of legislative spheres takes up a good portion of the time and energy of the best minds in the country. The problems that await solution call for the exercise of the wisest statesmanship. They cannot be solved by dilating on *a priori* theories borrowed from the West or antiquarian researches into the state of society in ancient and mediæval India. There is no use of a too rigid insistence on sanctity of contract or inviolability of property. Nor will slogans copied from books which have no relation to the concrete facts of the Indian situation which may result in strife, discord and misery of millions, do any good. The politician, the lawyer, and the average citizen will have to strive for a new social harmony.

In the foregoing remarks I have not made any special reference to the need for change in the personal law of the Hindus, as the reform of Hindu Law including the law relating to women's rights, is merely a part of the larger problem of social and legislative changes. I am aware that in this matter your State has set an example, in many respects forestalling British Indian Provinces. The process of change by textual interpretation by commentaries of acknowledged authority is no longer available, as that source is, of necessity, dried up under modern conditions. The process of change by judicial construction is still available to some extent, but the very nature of judicial process, as has already been pointed out, imposes obvious limitations on the expansion and adaptation of the law. It must be admitted that in several branches of Hindu Law, the Judicial Committee and the Indian High Courts have recently given a

proper direction to the development of Hindu Law, though now and then there have been decisions which have taken the profession and the public by surprise. Piecemeal legislation has in glaring instances set right some rules of law out of tune with modern conditions and the social consciousness of the people, though such legislation has occasionally resulted in making parts of Hindu Law an unintelligible jumble. A wholesale and radical change in the very concepts of Hindu Law is demanded by one school of social and legal reformers while another set is strongly opposed to any kind of legal change, though they easily reconcile themselves to even a chance decision revolutionising or making a serious inroad on our notions of the law.

Well-instructed opinion is decidedly in favour of changes in the joint family law in the interests of the growing commercial needs of the country, while, at the same time realising that in the larger interests of agriculture unless group property of some kind is recognized there may be total dismemberment of property and fragmentation of holdings in the villages. In any reform of Hindu Law, the interests of rural economy cannot of course be ignored.

The time also seems to be ripe for a codification of the Hindu Law of Succession on rational lines and on an intelligible basis without the Courts having to go through the process of calculating pindas which are never offered or a calculation of the particles of blood with reference to certain artificial rules laid down by our forefathers.

The law of adoption may be easily simplified without the lawyer having to dissect the pronouncements or dicta of the Judicial Committee in different cases on the problem of the nature of sapinda consent that is required for a valid adoption or the limits for the due execution of an authority to adopt.

The law as to the obligation of the different members of the family in regard to debts is still in an uncertain state and makes the task of the legislator working in new fields of social and economic reform exceedingly difficult.

The Indian law of procedure and limitation occupies too much attention of the Courts and a good deal of public time is wasted in unravelling a rule of procedure or the true import of a particular article of the Limitation Act. Procedure is intended to facilitate and ensure the administration of justice on sound principles and the law of limitation is similarly intended

to prevent agitation of stale claims. When the earlier Codes of Civil Procedure were enacted, they were mainly intended to assist Indian Courts with ready-made and detailed rules in the conduct of trials with due regard to certain fundamental principles in the administration of justice according to British ideas. When the Code of 1882 was repealed and that of 1908 was enacted, a serious attempt was made to differentiate between what might be regarded as principles of procedure, which were embodied in the main sections of the Code, and certain other provisions of a less important character which were relegated to the schedule and the rules portion of the Code which might be altered by the different High Courts in India. It was hoped that a certain elasticity of procedure could or would be secured by recourse to this machinery. But the experience of the working of the Code for the last 30 years has shown that the hopes of those responsible for the Code of 1908 have not been realised to the extent anticipated. Litigation involving pure questions of procedure has not, to any appreciable extent, diminished, and the number of decisions on such questions is decidedly on the increase. It does not require a detailed investigation to come to the conclusion that the number of decisions in the English Law Reports on pure questions of procedure bears no proportion whatever to the vast mass of Case law on procedure in India.

The Indian law of limitation is another subject which may well occupy the attention of the law reformer. When the Limitation Act was arranged into sections and articles laying down the starting point of limitation and different periods of limitation for various kinds of suits and applications, it was hoped that the Act would furnish ready-made answers to mofussil courts dealing with questions of limitation, and that the enactment would prevent the agitation of stale claims by litigants. The hopes have been baffled and the arraignment has only served to encumber the Law Reports and increase their size and volume. Experience of the working of the Limitation Acts of 1871, 1877 and 1908 makes one feel that possibly a Limitation Act on the lines of the Act of 1859 and the English Limitation Acts is more likely to achieve the objects of a proper limitation law than a too detailed enactment of the kind similar to the Indian statute. It is easy enough to get into a groove but very difficult to get out of it. Anyhow, it

ought to be possible for the law reformer to devise a simpler Code of Procedure or rules of limitation without in any way sacrificing the paramount interests of justice.

The law of evidence in force in British India, while resting on pre-eminently sound principles, is too antiquated and is capable of being improved in the light of recent developments in England. There is no reason also why an easily understood procedure should not take the place of ancient writs, as has been done in England, without in any way sacrificing the true spirit and principle underlying these writs.

To carry out all these reforms, it is necessary to infuse a new spirit in the lawyers and legislators—lawyers, who think not in terms merely of reported decisions and antiquated rules of a bygone age but in terms of a living and progressive society, and legislators with a sociological bent of mind. There must be a standing committee in every law association which would approach the study of these problems in a broad and catholic spirit and which would make suggestions as to legal changes. The Government, in their turn, ought to invite the sympathetic co-operation of the Profession. That, of course, does not involve that the Government are to sacrifice the interests of the public or the fundamental and ultimate aims of the party which, for the time being, is in power under a democratic form of Government.

SUMMARY OF ENGLISH CASES.

ROBERTSON *v.* PETROS M. NOMIKOS, LTD., (1939) A.C. 371 (H.L.).

Marine Insurance—Insurance on hull and freight—Damage to ship before charter voyage due to fire—Ship repaired and insurance as on partial loss claimed—Charterparty not performed—Claim on insurance on freight as on constructive total loss—Maintainability.

A marine insurance policy was for "4110*l.* on freight chartered or otherwise in and/or over" and was a time policy for twelve months. It was expressed to be subject to the Institute Time Clauses—Freight, which were set out in a slip attached to the policy. It also incorporated the hull and machinery policies. The vessel was chartered to a Belgium Company to load a cargo of crude oil for ports in the United Kingdom. While repairs were being executed before the starting in ballast on the voyage, there was an explosion on board followed by a fire resulting in damage. The owners had the ship

repaired and claimed for partial loss up to the full insured value of 28,000*l.* for it. The charterparty was never performed; and the shipowners claimed under the freight clauses from the insurers the full freight as on a constructive total loss. The insurers contended (1) that there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners who on the contrary had elected to retain the vessel and claim as for partial loss and (2) that the claim was excluded as being consequent on loss of time because the repairs took so long as to make it impossible to perform the charter party.

Held (on a construction of S. 61 of the Marine Insurance Act, 1906), that there was a constructive total loss and the shipowner was entitled to the amounts claimed.

(1938) 2 K.B. 603, affirmed.

PRATT *v.* PRATT, (1939) A.C. 417 (H.L.).

Divorce—Desertion—Refusal by deserted spouse to allow a meeting to discuss resumption of marital relation in spite of request—Effect on desertion.

Where the deserting spouse writes letters which indicate a genuine and honest desire to see and discuss matters with her husband in the hope that this would result in their "coming together" in their making "a new start" and "a home together in the future" and the husband refuses to allow a meeting to take place, her continued absence thereafter cannot without an utter misuse of language be called a desertion.

Decision of Court of Appeal in (1939) P. 117, affirmed.

FARLEY *v.* WESTMINSTER BANK, (1939) A.C. 430 (H.L.).

Wills—Gift for "parish work"—If valid charitable bequest.

A will contained a bequest to vicars and churchwardens "for parish work."

Held, "parish work" are words of such vague import as to go far beyond the ordinary meaning of charity in this case in the sense of being a religious purpose. The words are so wide that on no construction can they be brought within the limited meaning of "charitable" as used in law. The gifts therefore failed.

(1938) Ch. 482 (C.A.), affirmed.

BUCHANAN WOLLASTON'S CONVEYANCE, *In re*: CURTIS *v.* BUCHANAN WOLLASTON, (1939) 1 Ch. 738 (C.A.).

Joint tenants—Purchase of land jointly—Covenant not to sell without unanimous consent of all—Application by one to order sale—Sale if to be

ordered—Practice—Appeal—Evidence that could and ought to have been put before trial Court—If to be admitted on appeal for the first time.

Several persons who had purchased land as joint tenants entered into a mutual covenant whereby the land was not to be parted or dealt with except with the unanimous consent of all. Where one of the parties applies to the Court to order a sale, the Court will not aid that party to break his contractual obligations.

(1939) 1 Ch. 217, affirmed.

An application for admission of fresh evidence was rejected on the ground that it was evidence that could quite easily have been and ought to have been put before the Court below if it had any relevance to the appellant's case.

MACLENNAN, *In re* : FEW *v.* BYRNE, (1939) 1 Ch. 750 (C.A.).

Deeds and wills—Construction—Principles—Annuities of clear sums after deduction of income-tax—Reliefs recovered by annuitants under Income-tax Act—If to be returned to trustees of estate.

In construing documents, each word used by the settlor, or the testator, as the case may be, must be given its true and proper meaning in the context, and it is not legitimate for the purpose of construction to treat phrases used in the document as though they had been differently expressed. The precise language of the document is to be examined and the proper construction placed on it in relation to the particular subject-matter it deals with.

Under a will the testator bequeathed certain annuities each to his wife, children and wife's brother (not free of income-tax) and the residue to his wife. By a subsequent family arrangement they charged the residue of the annual income of the residuary estate (after providing for the annuities under the will) with the payment by the will trustees of "such an annual sum as together with the annuity under the will (£ 250) would (if such annual sum and annuity respectively were payable to the annuitant absolutely) after deduction of income-tax but not sur-tax leave the sum of £ 500 clear of all deductions for income-tax but not sur-tax." The annuitants were entitled to some reliefs for refund under the Income-tax Act.

Held, on a construction of the deed and will, that the reliefs to which the annuitants might become entitled under the Income-tax Act should be returned to the trustees of the estate.

In re BEALE : *Ex parte* THE BOARD OF TRADE, (1939) 1 Ch. 761.

Bankruptcy Act (1914), S. 19—Election of trustee by creditors—Trustee elected, a member of firm of accountants who had acted for debtor proving for debts for professional services—Objection to appointment.

On a receiving order against a debtor the creditors elected an accountant (a member of a firm who had acted for the debtor and was a creditor in respect of debts for professional services) as trustee. On objection taken by the Board of Trade under S. 19 (2) of the Bankruptcy Act, that because of his connection with or relation to the bankrupt or his estate it will be difficult for the proposed trustee to act with impartiality in the interests of the creditors generally.

Held, the objection must be upheld.

JOTTINGS AND CUTTINGS.

The Long Vacation.—The vacation which has now begun well merits its title of "the long," although in fact it is considerably shorter than it was not so many years ago. At one time it extended to practically three months, from 8th August to 2nd November; later it was curtailed to ten weeks from 13th August to 23rd October; while more recently it has been again abbreviated. Foreign observers have often commented adversely on its length. The Grand Duke of Weimar—Goethe's Grand Duke—in a conversation with Crabb Robinson "expressed his disapprobation of the English system of jurisprudence, which allowed lawyers to travel for months at a time," and Robinson had to admit that the Grand Duke was right. No doubt from the purely business point of view it seems highly anomalous to close the courts for so long a time, but the good sense of the English race seems early to have recognised the practical benefit of a cessation of litigation for a considerable period, and as one of the old judges, who doubtless appreciated the rest which came to him during "the long," once declared, it was absolutely essential that there should be a lengthy truce in litigious warfare to give the needed recovery from the contemplation of human nature not always at its best.—*S.J., 1939, p. 613.*

Sumneriana.—In each generation there is usually some member of the Bench who stands out in bold relief as possessing certain qualities which distinguish him from his colleagues and give him a title to remembrance which is denied to the judge, however eminent in many respects he may be, who is without that element of character or idiosyncrasy which stamps him as distinctive. To the former class of judges Baron Parke in a past day certainly belonged. That distinguished judge simply revelled in law, and nothing pained him so much as to find the record not drawn in what he considered the orthodox style; but although his decisions are still quoted and treated as authoritative, perhaps his chief title to diuturnity are the

stories which quaintly reflect his passion for law, as exemplified in the story which, if not strictly true, should be, of his taking a "beautiful demurrer" to the sick bed of a professional friend to cheer him into convalescence. Not very many of Parke's successors on the Bench have left their mark quite so distinctive as he did, but the late Lord Sumner ran him very close. Lord Haldane once described him as "a consummate lawyer"; but he was something more, possessing as he did the gift of rapid decision and the gift of expressing it in pointed language seasoned with wit.—*L.T., 1939, p. 99.*

At the Bar.—Like a good many others who were to achieve fame in the law, John Andrew Hamilton, afterwards to be ennobled with the title Lord Sumner, did not spring into professional fame all at once; but he was never idle, his pen, pointed with causticity, was busy in the columns of the now long extinct *Academy,* and later, in the writing of something like 300 articles for the Dictionary of National Biography into which he would slip a caustic comment eminently characteristic of him. In those early days he also wrote a short biography of Dan O'Connell, wherein we find this little jibe at his predecessors in the same biographical field: "O'Connell's biographers do not agree as to what Inn he studied at; his son John says Lincoln's Inn; Daunt says Gray's Inn; and Shiel, the Middle Temple. All these may be presumed to have had means of knowing the truth. Fagan follows Daunt, and Huish, Shiel; Mr. Shaw Lefevre puts him at the Inner Temple. There are no more Inns of Court." Occasionally this vein of humour would find expression even in the pleadings which came from him in his early days. Thus he was once called upon to draw a defence to an action for breach of promise of marriage. The plaintiff's statement of claim contained the usual allegations; the defendant promised to marry the plaintiff; the plaintiff was always ready and willing to marry the defendant; but the defendant refused or neglected to carry out his promise, whereby the plaintiff suffered damage in respect of which she claimed. As it came from Hamilton's hand the defence was a model of brevity, simplicity and wit. This it was: "The defendant admits that the plaintiff was always ready to marry the defendant, but save as aforesaid the defendant denies each and all of the allegations contained in the statement of claim."—*L.T., 1939, p. 99.*

As a Leader and Judge.—When Joseph Walton became a judge, Hamilton took silk, and till his promotion to the Bench there was scarcely an action of commercial importance in which he was not engaged. It is not easy to be amusing about charter-parties and bills of lading, but even to these prosaic documents Hamilton could

impart a fascination. Many were the great forensic combats he waged against his most formidable opponent, Thomas Edward Scrutton, an equally great lawyer, but not quite so witty, and who ere long was to follow him on to the Bench. As a judge, Hamilton established a record for the rapid despatch of business. Never once as a puisne did he reserve judgment. Although his judgments were at times a trifle long, they were models of lucidity and punctuated with caustic comment. In *Attorney-General* v. *Reynolds* (104 L.T. Rep. 852), a complicated case as to common rights in the New Forest, he had to consider whether a particular structure, sometimes called a "garden house," sometimes a "bungalow," and sometimes a "cottage," was a dwelling-house in respect of which certain rights could be claimed. In reading the judgment the student's interest is not lessened when in the midst of much technical detail he alights upon the following pleasant touch: "In summer time, with a house full of guests, I have no doubt that a bachelor guest might consider himself very tolerably lodged there; I think it is possible, in an emergency, even a manservant might consent to occupy it." In a later case, where a schoolmaster unsuccessfully sought to maintain an action for certain words alleged to have been spoken of him, Lord Sumner, as he had now become, said that "if a change of the law is desired, it is from the Legislature, as it was in 1891, that relief must come. It could be simply obtained . . . by enacting that a schoolmaster should be deemed a woman within 54 & 55 Vict., c. 51, S. 1!"—*L.T.*, *1939*, *p. 99*.

All in Public.—At the Manchester Assizes recently, Mr. Justice Croom-Johnson, after condemning a man to six months' imprisonment, cancelled the sentence on further reflection and bound him over. "Although I could have altered your sentence behind the scenes," he said, "I thought it better that you should come before me in public and that I should indicate why I am doing that which I am about to do." Some judges prefer to be merciful by stealth, others have mercy secretly thrust upon them. Of the former, Mr. Baron Martin, after passing a severe sentence would sometimes modify it in favour of the prisoner before signing the calendar. Of the latter, that William O'Brien whose behaviour on the Irish Bench aroused so much criticism used to pass the most erratic sentences, sometimes ferocious, sometimes sentimentally lenient. Some of the more farcically heavy punishments inflicted by him appeared upon the Crown Book with the spoken word discounted by as much as 80 per cent.—*S.J.*, *1939*, *p. 638*.

Behind the Scenes.—In the sentencing of prisoners, Mr. Justice Day had a system all his own. The heavy punishments he distributed

in open court struck terror into the hearts of the members of the criminal classes listening in the public gallery. Then, having produced the desired effect of frightening them out of their wits, he would revise his sentences without any publicity when he came to sign the calendar. Once public indignation was thoroughly roused when at Carlisle Assizes he condemned a man to five years' penal servitude for stealing a waistcoat. "Faith," said an Irish member of the Bar, "if the fella had stolen a suit of clothes he would have hanged him." The storm reached the House of Commons and the Home Secretary was asked a question about this exploit of Day, J. To everyone's surprise he answered: "It is *not* a fact that John Jones was sentenced to five years' penal servitude for stealing a waistcoat." There was consternation in the House as the questioner had been in court at the time. Then the Home Secretary continued: "I hold in my hand the calendar, and it appears that John Jones was sentenced to six months' imprisonment."—*S.J., 1939, p. 638.*

Home-made Wills.—All lawyers are at some time or another confronted with the layman who demands to know why he should pay to have a will drawn up for him when he can do it perfectly well himself and save his guineas. "I am certainly capable," he says, "of stating clearly what I wish to happen to my money." For such the case of Re *Smithers*: *Watts* v. *Smithers and Others* (The Law Journal, August 5, 1939, p. 101) is useful ammunition. The testatrix obtained a printed will form, and when her "securities" had been converted into cash, she made bequests of two-thirds of the proceeds, and the "remainder of the money." She did not know upon what a quaking bog of judicial interpretation she was walking. "Securities" has a primary and a legal meaning, so that there was no doubt that certain money belonging to the deceased passed under that heading. But the testatrix also possessed shares in industrial companies. Could it be said that those stocks and shares were included in the term "securities"? Crossman, J., held that they could not, and to include them would only be guessing the testatrix's intention. It is no disrespect to the learned Judge to say that had he permitted himself to guess he would almost certainly have come to the opposite conclusion, especially in view of Re *Scorer*: *Burtt* v. *Harrison* (94 L.J. Ch. 196). The testatrix was making her own will, and as she almost certainly did not know the strict meaning of the word "securities" she could only have used it in the colloquial sense. Those interested in her estate have now had to pay many times what she originally saved in lawyers' fees.—*L.J., 1939, p. 108.*

The Great Seal.—In view of the forthcoming visit of the Lord Chancellor to Canada, the announcement at p. 644 of last week's issue that His Majesty the King has appointed Commissioners to have the care and custody of the Great Seal while Lord Maugham is absent from the Kingdom, is a remainder of the fact that the Great Seal, to which an almost mystical significance attaches as the sign and symbol of the highest authority, cannot be taken outside the realm, seeing that it may at any time be required to be used. With its custody, we naturally associate the Lord Chanceller for the time being, and indeed its transfer to him invests him with the manifold powers attaching to his high office. A recent writer tells us that in early times, the Lord Chanceller was the King's Chaplain and the Keeper of his conscience, and remains the Keeper of the Great Seal. Considering its official importance, the Great Seal has always been carefully conserved, though not always in the precise fashion waggishly asserted by Dickens who made one of his characters declare that it was guarded night and day by two men in bag wigs and with drawn swords. Even all the care bestowed upon its safe custody has not, however, always conferred immunity upon it, for at least on one occasion it was stolen from the house of the Lord Chancellor. In an old report relating to the Court of Chancery occurs this curious item: "For sixteen yards of woollen cloth at 8 *s*. a yard to use about the Great Seal at the time of sealing, for one whole year, £6 3*s*." When a new Great Seal is made, the old one is "damasked", that is, tapped slightly with a hammer, which is assumed to deprive it of its former virtue, and then it becomes the perquisite of the Lord Chancellor for the time being.—*S. J., 1939, p. 645.*

BOOK REVIEWS.

THE WORKING CONSTITUTION OF INDIA, by S.M. Bose, M.A., LL.B. (Cantab.). Published by Oxford University Press, B. I. Building, Nicol Road, Bombay. Price Rs. 20.

This is only a commentary on the Government of India Act, 1935, as the sub-title of the book shows. The Act is of great importance to the practising lawyer, to the student of Indian Constitutional History and to politicians and legislators. Each of these may have different needs and desire a different type of commentary. The practising lawyer may require a citation of cases decided by the Judicial Committee on similar questions arising from the Canadian and Australian Constitutional Statutes. The student may require historical treatment and the politician and legislator may not require much of either for

his limited purposes. Many Editions of the Act with and without much commentary are bound to be brought out to serve all three groups in varying degrees. This book is intended primarily for the lawyer but the other two groups will find it useful. A commentary may run into minute details of decisions and become diffuse or may deal with principles and furnish guidance for the student and lawyer without running into any great detail. The commentary of the author is sharp and pointed. It is needless to add that the neatness of the printing assists in making the book attractive, notwithstanding a few errors here and there.

A supplement of the Orders in Council may be required to complete the usefulness of the book for the lawyers in particular.

THE LEGAL PRACTITIONERS ACT with INDIAN BAR COUNCILS ACT, 1926, by Kshitish Chandra Chakravarti, M.A., B.L., Advocate, Federal Court, Delhi, Fourth Edition, Revised and Enlarged. Published by M.C. Sarkar & Sons, Ltd., 14, College Square, Calcutta. Price Rs. 3-8-0.

We have great pleasure in acknowledging the receipt of the commentaries on the Legal Practitioners' Act by Mr. Chakravarti. This is the latest commentary on the enactment. The book opens with an introduction which gives a historical account of the law on the subject from the earliest times. The various enactments bearing on the subject from time to time in the several provinces are noticed and their effect summarised in the introduction. Then follow the provisions of the Act with a full commentary giving all the decisions in their appropriate places and explaining the scope of the sections. The appendices give the other enactments bearing on the topic, the most important of which is the Indian Bar Councils Act. The rules relating to legal practitioners framed by the High Courts are also given by way of appendices. Thus no effort has been spared to make the book a comprehensive guide on the subject. We hope that the book will meet with the popularity which it deserves.

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COPARCENER'S RIGHT TO SUE FOR SEPARATE MAINTENANCE

BY

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Non-existence of right assumed

It is somewhat strange that the competency of a suit by a coparcener for separate maintenance has seldom come up for examination by Courts of law in the past. It seems to have been more or less assumed generally that among the male members of an ordinary undivided Hindu family a suit by one member against another for maintenance is not sustainable.[1] Adverting to the view that where a member could have sued for partition he could not sue for maintenance, the criticism has been made:

> "But it is difficult to see why a coparcener, who is willing to continue as a member of an undivided family should be driven out of it by what must be wrongful conduct on the part of the manager in refusing him his proper support out of the family funds."[2]

The question arises whether there is any basis at all to warrant the view referred to.

Nature of coparcenary

According to the true notion of an undivided family in Hindu law, no individual member thereof can predicate of the joint and undivided property that he has any certain and definite share therein. The proceeds of the undivided property must be brought into the common chest and applied for the purposes of the family.[3] Until the joint status is disrupted each coparcener has a right to common possession and enjoyment of the

1. West and Buhler, Hindu Law, 4th edn., p. 603.
2. Mayne, Hindu Law, 9th edn., p. 658, para. 458.
3. *Appovier* v. *Ramasubbier*, (1866) 11 Moo I.A. 75 at 89 (P.C.).

coparcenary property.[1] If any coparcener is excluded from joint possession he need not sue for partition but he can sue for a declaration of his right to such possession.[2] He may also obtain an injunction to restrain the manager from obstructing him in the joint enjoyment of the property.[3]

Participation in income

No coparcener is entitled to any definite share of the income of the family property.[4] Nor is there any obligation on any member of the family to stir a finger if he does not feel so disposed, either for his own benefit, or for that of the family; if he does do so he gains thereby no advantage; if he does not do so he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division.[5] A coparcener has no right to demand an account of the family income; even where it exists it is only as incident to the right to require a partition.[6] His interest, however, carries with it the inchoate right to raise an action of partition and that until partition is *de facto* accomplished he has a right to maintenance. This is an *inherent quality of the right of coparcenary*—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, the coparceners have a right, till they exercise their right to divide to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family, who is invested with the management.[7]

Remedy on infraction of right

The right being so declared, the question arises as to the remedy available to a coparcener for its enforcement should there be an infraction of it. The resort to an action for partition being a drastic remedy can only be thought of as a last step. Still, it has been stated that a son who can sue for partition cannot sue for maintenance, but where he cannot sue

1. *Katama Nachiar* v. *The Raja of Shivaganga*, (1863) 9 Moo.I.A. 539 at 543, 615.

2. *Naranbhai* v. *Ranchod*, (1901) I.L.R. 26 Bom. 141 at 144.

3. *Anant.* v. *Gopal*, (1894) I.L.R. 19 Bom. 269; *Ganpat* v. *Annaji*, (1898) I.L.R. 23 Bom. 144 and *Soshi Bhusan Ghose* v. *Gonesh Chunder Ghose*, (1902) I.L.R. 29 Cal. 500.

4. *Pirthi* v. *Jowahir*, (1887) L.R. 14 I.A. 37: I.L.R. 14 Cal. 493 (P.C.).

5. *Ranganmani Dasi* v. *Kasinath Dutt*, (1868) 3 Ben.L.R.O.C. 1.

6. *Soorjeemoney Dossee's case*, (1857) 6 Moo.I.A. 526.

7. *Rama Rao* v. *Raja of Pittapur*, (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

for partition he is entitled to sue for maintenance.[1] If a right to maintenance is an inherent right of every coparcener it is difficult to perceive why he cannot enforce that right by suit and what paramount or compelling reason there can be to make it desirable that he should sue for partition only. The proposition rests on the authority of a decision of the Bombay High Court referred to in *Himmatsingh* v. *Ganpatsingh*[3]. According to it a suit by a coparcener against others for maintenance will not lie unless he were indeed illegitimate, or suffering from some other disability to enforce partition. In *Himmatsingh* v. *Ganpatsingh*,[3] the property out of which maintenance was sought was impartible and there was no possibility of partition. It was held that a suit for maintenance would be competent. Adverting to the earlier case[2], the Court merely observed:

> "We say nothing as to the right of a son to sue for maintenance where he might sue for partition,"

thereby leaving the point open. In *Ramachandra* v. *Gopal Vaghs*, under the impression that *Himmat Singh's case*[2] allows a suit by a coparcener for separate maintenance to be brought generally, Pinhey, J., observed:

> "I think it not at all improbable, that in some future case, when the point is further considered and exhaustively argued, . . . the authority of *Himmatsingh* v. *Ganpatsingh*[3] will be shaken. And I should be glad to see that case overruled, for the rule which it lays down appears to me to be subversive of Hindu society and very injurious. I can conceive nothing more fatal to the happiness of Hindu family life than for this Court to affirm the principle that a Hindu father is liable to have to provide for each of his sons a separate maintenance, while the sons may choose to live a life of idleness and probably in consequence . . . . a life of vice."

The criticism fails to notice that there is no obligation whatsoever on any coparcener to exert himself[4], and that his right to maintenance is an inherent quality of his coparcenership.[5] It is also unduly swayed by the theory of parental authority over children. In *Bhupal* v. *Tavanappa*,[6] it was held that inasmuch as under the Bombay law a son cannot sue for partition, he can sue for maintenance on being driven out of the family. The decision does not state that if he could have sued

1. Mayne, Hindu Law, 10th edn., p. 825, para. 685; Mulla, Hindu Law, 8th edn., p. 582.
2. (1875) 12 Bom.H.C. 94 at 96 note.
3. (1877) I.L.R. 2 Bom. 346.
4. (1868) 3 Ben.L.R. O.C. 1.
5. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
6. (1921) I.L.R. 46 Bom. 435.

for partition he could not sue for maintenance. In a still later case,[1] the Bombay High Court has laid down, on an application by a District Magistrate under S. 88 of the Indian Lunacy Act, for separate maintenance for a lunatic son, that such maintenance should be decreed, that a father *as manager of the joint family* is bound to maintain the son, and that the obligation is independent of any consideration whether on account of the son's lunacy the father should maintain him as a person disqualified to sue for partition. This decision does not lend countenance to the view that a suit for separate maintenance will be competent only where a suit for partition will not lie.

In *Bhagwan Singh* v. *Mst. Kewal Kaur*[2], a coparcener's widow sued for separate maintenance for herself, her infant son and daughter. The suit was decreed on the ground that the manager's obligation to maintain was absolute. The point, however, does not seem to have been raised whether it is not a suit for partition on behalf of the son that should have been brought. In *Harendranath Avasti* v. *Shibo Sundari Debi*[3], it was held by the Calcutta High Court that an adult coparcener cannot bring a suit for separate maintenance. The learned Judges observed:

> "The only other question is whether he can claim a monthly sum by way of maintenance. We are clearly of opinion that he cannot No authority has been cited for the proposition that a male member of a joint family who refuses to remain joint in food is entitled to separate maintenance out of the family funds."

Here again the decision rests on assumption and the absence of authority to the contrary.

So far as Madras is concerned, in *Subbayya* v. *Marudappa*[4], Varadachariar, J., observed:

> "It is doubtful if a son can maintain a suit for maintenance against the father when he could as well sue for partition."

The reasons for the doubt raised are not given and probably it was engendered by the statement of the position in the text-books. In *Cherutty* v. *Nagainparambil Raru*,[5] the plaintiff sued for separate maintenance for himself, his minor son and others against the manager of the joint family. It was

1. *Chanvir Gavda* v. *District Magistrate, Dharwar*, (1926) I.L.R. 51 Bom. 120.
2. (1927) I.L.R. 8 Lah. 360.
3. (1909) 3 I.C. 378 at 380.
4. (1936) 71 M.L.J. 568: I.L.R. (1937) Mad. 42.
5. (1939) 1 M.L.J. 683.

held by the High Court in the first instance that the suit was incompetent, that so far as the adult coparcener was concerned his remedy on denial of maintenance was to sue for partition, and that as regards the minor coparcener the suit should have been in the alternative either for partition or for maintenance, as the Court may decide. This decision has however been recently reversed in Letters Patent Appeal and it has been held that even an adult coparcener can sue for separate maintenance.[1] As a direct and authoritative exposition the decision is invaluable. The manager occupies a position analogous to that of a trustee.[2] He may in fact be compared to a quasi-trustee subject under Ss. 95 and 96 of the Trusts Act to obligations similar to those of a trustee and as such enabling the beneficiary to compel him to perform his acts of duty under S. 61 of the Act. It is also true that there is no reason founded on sound principle, why a Hindu coparcener who is excluded from the enjoyment of his rights should against his will be driven to sue for partition, to secure relief.[3] This will however be a double-edged consideration. If to keep the family unbroken the coparcener is allowed to sue for separate maintenance, it may be that the manager will find the family discipline undermined and a lack of co-operation and team work —which are the ideals of a joint family—promoted, making his position difficult and compelling him to sever himself from the family.

Right to sue for separate maintenance should not be absolute

It is desirable that the coparcener's right to sue for separate maintenance should not be construed as an absolute right, but one depending upon the facts of each particular case. If the coparcenary property is impartible or if the coparcener is disqualified from enforcing a partition or is a minor there is no dispute that a suit for maintenance will be competent. It is only in the case of an adult coparcener that the necessity for a limitation will arise. Where he is excluded or driven out of the family there will be justification for allowing him to sue for

1. (1939) L.P. Appeal 96 of 1938: 50 L.W. Short Notes p. 84.

2. *Chuckun Lal Singh* v. *Porun Chunder*, (18+8) 9 W.R. 483; *Krishna* v. *Subbanna*, (1884) I.L.R 7 Mad. 564; *Annamalai* v. *Murugasa*, (1903) 13 M.L.J. 287: L.R. 30 I.A. 220: I.L.R. 26 Mad. 544 (P.C.); *Perrasu* v. *Subbarayudu* (1921) 41 M.L.J. 33: L.R. 48 I.A. 280: I.L.R. 44 Mad. 656 (P.C.).

3. *Naranbhai* v. *Ranchod*, (1901) I.L.R. 26 Bom. 141.

separate maintenance. But where maintenance is not in fact denied or joint family life has no attractions for a coparcener it is difficult to see why he should not be asked to sue for a partition.

Quantum of maintenance

Where separate maintenance is allowed a question may arise as to its quantum. Obviously this will depend upon the resources as well as the needs of the family as a whole. The liability to maintain the coparcener is not however limited to the income of what would have been his share on a partition of the family property.[1]

SUMMARY OF ENGLISH CASES.

WRIGHT v. NEW ZEALAND FARMERS CO-OPERATIVE ASSOCIATION OF CANTERBURY, LTD., (1939) A.C. 439.

Guarantee—Continuing guarantee applicable to "the balance that is now or may at any time hereafter be owing"—Limitation—Commencement—Contract of sale by mortgagee in pursuance of his powers under mortgage—Rescinding from contract and re-sale at a lower price to new purchaser—Mortgagee if accountable for purchase-money under first sale.

Where a guarantee is to apply to the balance which at any time thereafter is owing, the question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted, and the number of years which have expired since any individual debit was incurred is immaterial.

There is no legal or equitable principle upon which can rest the proposition that a mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is accountable to the mortgagor for purchase money which he has never received.

MAURICE v. GOLDSBROUGH MORT & CO., LTD., (1939) A.C. 452.

Insurance—Goods held on commission by bailee—Insurance by bailee—Loss by fire—Extent of insurance—Respective rights of wool grower and wool broker in the insurance money.

The appellants were wool growers who consigned 123 bales of wool to the respondents, wool brokers, in whose store they were des-

1. Mulla, Hindu Law, 8th edn., p. 582; *Chanvir Gowda v. District Magistrate, Dharwar*, (1926) I.L.R. 51 Bom. 120.

troyed by fire. The respondents had paid the expenses of the road and rail carriage to the store and in their name insured the wool along with that of other clients. After the fire the respondent claimed to deduct from the insurance moneys collected by them, commission which they would have earned on sale and charges which they would have been entitled to make for receiving, weighing, lotting, appraising value, etc., if the wool had not been destroyed. The appellant disputed the claim on the ground that the commission had not been and could not be earned and the other charges were deductible from the insurance moneys only as to services actually performed. The policy stated that loss or damage was not to include profit of any kind.

Held, the policy does not cover profits but only the wool. The position in the event of loss must depend on the terms of the contract and similarly the apportionment of that value between the appellant and the respondents must depend on the respective rights of property which the parties had at the date of the fire. The appellant was entitled to the whole of the insurance money and the respondents were not entitled to deduct the commission and other charges they would have been entitled to make if there had been a sale.

LADORE *v.* BENNET, (1939) A.C. 468.

Constitutional Law—British North America Act, 1867, Ss. 91 and 92—Provincial legislation to amalgamate four insolvent municipalities and make consequential provisions—Infringement on power of Dominion legislature—Effect on validity.

By 1935 four adjoining municipalities in Ontario each of which had raised loans for local purposes on debentures not charged upon municipal properties, were in acute financial difficulties and defaulted in payment of debenture interest and maturing principal. Various public utility corporations associated with the municipalities also were unable to meet demands on debenture issued by them. The Government of the province in its legislature passed the impugned statute, the City of Windsor (Amalgamation) Act, 1935, amalgamating the four municipalities into one, as the corporation of the City of Windsor. By S. 7 the Finance Commission was to arrange for the funding and refunding the debts of each of the municipalities by the imposition of rates on the rateable property in the area comprised in the respective old municipalities. By amending Act of 1936 the Finance Commission was abolished and its duties transferred to the department of municipal affairs, Ontario. Similar provisions were made for the public utility commissions. Some of the debentures were held by persons outside the province. The plaintiffs attacked the provincial legislation and the authority conferred in connection with the municipalities, as *ultra vires* as they invaded the field of

Dominion legislature as to (*i*) bankruptcy and insolvency [S. 91 (21)] and (*ii*) interest [S. 91 (19)] and (*iii*) were not within the exclusive powers of the province as they affected private rights outside the province.

Held, the province has exclusive legislative power in relation to municipal institutions in the province [S. 92 (8)]. If for strictly provincial purposes, debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the province. The pith and substance of the Ontario Acts are that they are passed in relation to municipal institutions in the province and so they are *intra vires*. As to their affecting the public utility companies, they will be justified as having been passed in relation to local works and undertakings under S. 92 (10) of British North America Act, 1867, and it was no encroachment on exclusive power of Dominion legislature over "interest" as it is directed *bona fide* to the effective creation and control of municipal institutions.

BUTLER *v.* THE KING, (1939) A.C. 484.

Constitution of Colonial High Courts—Trinidad and Tobago—" Acting Judge " if "Puisne Judge" of the Supreme Court capable of being member of Court of Criminal Appeal—Effect of ordinances.

By the Judicature Ordinances of 1880 the Supreme Court of Trinidad and Tobago consists of a Chief Justice and three Puisne Judges. There was provision in the ordinance for appointment of acting Judges as substitutes in case of vacancy. An ordinance of 1931 established a Court of Criminal Appeal the Judges of which were to be the Chief Judge and Puisne Judges of Trinidad and the ordinance contained no power to appoint an acting Judge to the Court of Criminal Appeal. The Court of Criminal Appeal consisting of the Chief Justice and two acting Judges appointed by the Governor to hear the appeal dismissed an appeal against a conviction for sedition. On appeal to the Privy Council,

Held, an acting Judge appointed by the Governor (not as a substitute for any individual) was not a Puisne Judge and cannot be a member of the Court of Criminal Appeal. As the Court of Criminal Appeal was not properly constituted the order dismissing the appeal against conviction should be declared void and of no effect.

REGIER *v.* CAMPBELL-STUART, (1939) 1 Ch. 766.

Principal and agent—Agent for purchase of house—Purchase by agent in name of another and re-sale to himself at higher price—Subsequent sale to principal at a further profit—Accountability of agent for secret profits.

In December, 1937, plaintiff's son who became friends with the defendant asked and the defendant agreed to find a house and from time to time sent particulars of houses. In January the defendant heard of and inspected a certain house, a leasehold having some years to run, at a ground rent of £125 and the price, as stated in the particulars by the house agents was £4,250. In the particulars sent to the defendant was a note that £2,500 would be accepted. The agents who had not been able to sell it in an auction early in 1937, had it in their hands to dispose of at the best price but had not received any serious offers. When the defendant through his wife inquired if the price of £2,000 would be accepted, they accepted it. On 10th January, 1938, a contract was entered into by the defendant in the name of his brother-in-law for purchase of the property. On 16th February, 1938, a contract was entered into between the defendant and his brother-in-law by which the defendant purported to buy the property from his brother-in-law for £4,500. On 19th January, 1938, the plaintiff returned to England from Russia and together with her son and defendant visited the house. The plaintiff's son was anxious to buy the house and the defendant said he had purchased it and his wife was unwilling to let it go. When plaintiff and her son pressed, it was finally agreed that defendant will sell the house to plaintiff for £5,000. Defendant told the plaintiff that the house had cost him £4,500 and wanted £500, partly as profits and partly as remuneration for services. On 24th February, 1938, a contract was entered into between plaintiff and defendant for the purchase of the house for £5,000 and a deposit was paid. Defendant then borrowed from his bank on the security of the contract a sum of £3,000 to pay off the original vendors, etc. Ultimately the plaintiff discovered the true facts, but without repudiating the contract for fraudulent misrepresentation, accepted the bargain and claimed damages and an account of the profits which the defendant had made as a result of the transactions.

Held, up to the sale, the defendant was the agent of the plaintiff and it is the duty of every agent to act honestly and faithfully to his principal, and if the agent conceals most material facts from his principal and by a fraud obtains an advantage to himself by purporting to sell, or by selling, property which is his own the duty which lies upon him is not ended by such contract and he remains liable to account for any secret profit which he has made as the result of his transactions between himself and the principal.

In re CAREW : CHANNER *v.* FRANCKLYN, (1939) 1 Ch. 794.

Wills—Legacies and annuities in the nature of settled legacies—Estate insufficient—Abatement.

The testatrix, over-estimated the value of her estate which was quite inadequate to provide the legacies she had given, subject to her sister's life interest and also the capital sums necessary to provide two annuities. On a construction of the will, held that the annuities were settled legacies of a capital sum adequate to provide the annuities, of which the annuitant was to be regarded as a life tenant, and are subject to abatement in the same way as any other legacy.

WESTHOUGHTON COAL AND CANNEL CO. LTD. *v.* WIGAN COAL CORPORATION, LTD., (1939) 1 Ch. 800 (C.A.).

Mines—Flooding of plaintiff's mines by water accumulating through artificial tunnel which has ceased to be under the control of the defendant—Liability.

Assuming that a mining lessee in the course of working his mine, artificially diverts a flow of water, whether in his own or a neighbouring mine by a work constructed solely for that purpose, with the result that the diverted water would, but for a precaution taken by the lessee, for example pumping find its way into a neighbour's mine and if the precaution is afterwards abandened so that the water does invade the neighbour's mine, he is liable. The defendants committed no wrong towards any one in making a tunnel and bringing water through it during the period they had control of the tunnel. But if the flooding of the plaintiffs' mines takes place by water accumulating by the flow through the tunnel, after the defendants have ceased to have any control over the tunnel, if the plaintiffs have a remedy against any one it is not against the defendants.

In re COOPER COLIN : LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK, LTD., AND OTHERS, (1939), 1 Ch. 811 (C.A.).

Wills—Secret trust—Revocation of will except regarding bequest to trustees on trust and increasing that bequest—If valid trust constituted in respect of the increased amount.

A subsequent will revoking an earlier one contained this clause :—"The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum.

Held, if a testator is minded to make use of the machinery of a secret trust, there must be communication to the trustees, acceptance by the trustees and the execution of the will or codicil in reliance of that acceptance. As these essentials were absent in the present case the gift as to the additional sum of £5,000 failed.

MARGINSON *v.* BLACKBURN BOROUGH COUNCIL, (1939) 2 K.B. 426 (C.A.).

Res judicata—*Third party proceeding by defendant against plaintiff in an earlier action—Subsequent suit by plaintiff in another distinctive capacity* —Res judicata—*How far applicable—Procedure—Recourse to shorthand notes in earlier suit not included in formal judgment—Propriety.*

In an earlier action in the County Court by owners of some premises for damages due to the collision against both the plaintiff and defendant, both denied liability and each alleged that the accident was solely caused by the negligence of the other. By third party notice they claimed against one another for indemnity or in the alternative contribution. In addition the present defendant claimed against the plaintiff damages in respect of damage done to their omnibus. It was held, both were to blame for the accident. The present action was brought (1) in respect of injuries and damages which the plaintiff alleged he had received by a collision (in which his wife was killed) between the plaintiff's motor car driven by his deceased wife and the defendant's omnibus driven by their servant due to the alleged negligence of the defendants' servant; (2) as personal representative of his wife's estate for loss of expectation of life under Law Reform (Miscellaneous Provisions) Act, 1934; and (3) under the Fatal Accidents Act on behalf of himself and his daughter as partial dependants of the deceased.

Held, in deciding a question of *res judicata* the Court is entitled to have recourse to information which is to be derived from reading a record of the proceedings in the earlier suit to find out what was actually decided in the earlier trial. The action can proceed so far as it is founded upon the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, but there is *res judicata* with regard to the claim for damages in the plaintiff's personal capacity.

UNION COLD STORAGE CO., LTD. *v.* SIMPSON, (1939) 2 K. B. 440 (C.A.).

Income-tax Act (1918), *Sch. D, Cases I and II, rr.* 6 (2), 6—*Wear and tear of machinery held on lease—Deductions—If lessee company entitled to.*

By a lease deed dated, December 29, 1921, two persons who had the voting control of the appellant company demised to the company for a term of 21 years the whole of the assets consisting of lands, freezing works, cold storage, factories, mills, etc., all over the world at a rent of £9,60,000 payable to 3 persons in Paris. The lease contains a full repairing covenant under which the lessees take the burden and undertake at the end of the lease to deliver up the whole demised premises with all additions and improvements. The com

pany claimed a deduction under Schedule D, Cases I and II, r. 6 in respect of the machinery and plant and that they were entitled to allowance for wear and tear. Reversing the decision of Macnaghten, J., the Court of Appeal upheld the claim of the company to the deduction.

(1933) 17 Tax Cases 488, Overruled.

HILL *v*. WOLVERHAMPTON CORRUGATED IRON CO., LTD., (1939) 2 K. B. 469 (C.A.).

Workmen's Compensation Act (1925), S. 11 (3)—Compensation to disabled workmen based on agreed pre-accident average weekly earnings—Increase in average rate of wage—Review—Matters for consideration.

For the purposes of review under S. 11 (3) of the Act, the actual periods during which the applicant worked in the 12 months preceding his accident should be taken into consideration, the wages earned in those periods being adjusted by substituting for the actual amounts earned sums ascertained on the increased rate.

COPEMAN *v*. COLEMAN, (1939) 2 K.B. 484.

Income-tax—Finance Act (1936), S. 21 (1) (9) (b) and (c)—Disposition in favour of children by allotment of shares in company—When a settlement under S. 21 (9) of the Finance Act, 1936.

In 1935, a company was formed with a capital of £1,000 in £1 shares held by the respondent and his wife to take over the respondent's business. At an extraordinary meeting on March 18, 1937, the capital was increased to £6,000, and it was provided that 25 preference shares should be created of £200 each entitled to a 10 per cent. preferential dividend and to participate with the ordinary shares equally in the surplus. The shares were allotted in consideration of £10 each in cash. Two such shares were allotted to the respondent's two children. On March 31, 1937, a dividend of 20 per cent. was declared free of tax, *i.e.*, each child received £40. Then a resolution was passed to call for £40 per preference share.

Held, this was not a *bona fide* commercial transaction and was a disposition or an arrangement in the nature of a disposition within the meaning of S. 21, sub-S. 9 though the settlements are made through the interposition of the company.

BATTY *v*. SCHRODER, (1939) 2 K.B. 495.

Income-tax—New partnership exercising option to treat trade of old partnership as discontinued—Loss in old trade if can be set off against profits of new trade.

A new partnership exercised the option under the Income-tax Act (1918), Sch. D, Cases I and II, r. 11 (1) to have the tax com-

puted as if the old trade had been discontinued and a new trade set up. In a claim by the new partners to set off the loss in the last year of the old partnership against profits in the new one,

Held, the right to set off losses against profits is only in respect of the trade in which the loss was sustained and the right cannot be claimed as against the profits of the new trade.

INLAND REVENUE COMMISSIONERS *v.* TRING INVESTMENTS, LTD., (1939) 2 K.B. 503.

Income-tax—Finance Act (1922), S. 21—Income of company deemed to be income of "members"—Person with an option to take shares—If such member.

Held, that a person with an option to take shares, is a person who had an interest in the capital of the company within the meaning of Finance Act, 1922, S. 21 (7) and as such a member of the company.

In re THE TRUNK ROADS ACT, 1936 AND *In re* THE LONDON-PORTSMOUTH TRUNK ROAD, (1939) 2 K. B. 515.

Land acquisition—Compulsory purchase order—Public enquiry—Procedure.

As the object of the inquiry was to hear objections to the proposals for the improvement for which the land was required it was not essential that evidence should be called on behalf of the Ministry. It was for the objectors to state their objections and to call such evidence as they might think proper in support of their objections.

BUSH BEACH AND GENT, LTD. *v.* ROAD, (1939) 2 K.B. 524.

Income-tax—Sum paid for cancellation of contract in ordinary course of business—If profits of business.

The appellant company received a payment of £4,500 for terminating a contract which was made in the ordinary course of business.

Held, the payment must have been in respect of the profits to have been earned under the contract and was liable to income-tax.

CAMPBELL *v.* SHELBOURNE HOTEL, LTD., (1939) 2 K.B. 534.

Tort—Invitees—Liability of owner of premises for negligence causing injury to invitee.

The plaintiff booked a room in the defendant's hotel on April, 24, 1938, proposing to stay there that night, the following day and the following night. He slept in the bedroom allocated to him on Sunday night and on the morning of Monday made his way to the lavatory but he did not notice the features on the way. He was out

of the hotel during the day and returned at 7 P.M. for dinner and went out again and returned at 11-20 P.M. After reaching his bedroom he had to go to the lavatory. There was no light in the passage leading to the lavatory. Plaintiff went to the other side of the passage and came by feeling, to a door, thinking it to be the door of the lavatory opened it and immediately fell into the basement below and was injured and suffered damage for which he sued the defendants. Originally his claim was based on negligence and by amendment was added alternatively a claim for breach of warranty. The defence was that there was no duty to plaintiff, there was no negligence on defendants' part and that the plaintiff was guilty of negligence himself and that his negligence was the sole cause of the accident and that plaintiff accepted the risk by going somewhere where he had no right to go and was therefore a trespasser.

Held, the plaintiff was an invitee and defendants owed the highest duty to take reasonable care that the premises were safe. Here there was no negligence on the part of the plaintiff and the plaintiff is entitled to succeed upon either on the ground of negligence or on the ground of warranty.

KAWASAKI *v.* BANTHAM STEAMSHIP CO., LTD., (1939) 2 K.B. 544 (C.A.).

Charterparty—Liberty to cancel " if war breaks out involving Japan "—Construction.

The fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out between China and Japan. The word " war " in the charterparty must be construed having regard to the general tenor and purpose of the document in what may be called a common sense way and not by obscure and uncertain technicalities of international law.

Decision of Goddard, J., affirmed.

SWAIN *v.* SOUTHERN RAILWAY CO., (1939) 2 K.B. 560 (C.A.).

Railway Company—Duty to maintain road on bridge and approach thereto—Liability for accident due to negligence or default—Public Authorities Protection Act (1893), S. 1—If railway company a public authority.

The defendant Railway Company obtained Parliamentary powers to make the line, which they made hoping to derive profits for shareholders. As one of the terms upon which they obtained their franchise, there was imposed upon them the duty of erecting and maintaining bridges and their approaches. The plaintiff who sustained injuries from a fall from his bicycle by reason of the fact that the wheels got into a rut in the road, on a bridge claimed damages on the alleged

negligence of the defendant company to fulfil their obligation to maintain the roadway.

Held, the railway company is not a public authority and is not placed in the position of a surveyor and the suit does not fail by reason of its not having been commenced within six months of the neglect or default complained of. The principle that a road surveyor or a local board or a public corporation responsible for the repair of roads is not liable to a person injured in respect of non-feasance has no application to a company carrying on its business for profit and the defendant is liable for non-feasance also.

HOWELLS *v.* INLAND REVENUE COMMISSIONERS, (1939) 2 K.B. 597.

Income-tax—Income-tax Act (1918)—All Schedules Rules, R. 21—Mortgagee acting as solicitor for mortgagor in a sale—Retention of money out of sale proceeds for interest due to him—If solicitor agent of mortgagor bound to pay the tax for the interest within the meaning of all Schedules Rules, r. 21.

All Schedules Rules, r. 21 provides : "upon payment of any interest of money..............the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment." The appellant, a solicitor, who was also the mortgagee, acted for his mortgagor in a sale and retained out of the sale proceeds some money in respect of the interest due to him.

Held, the appellant received the purchase money as solicitor for the mortgagor and in appropriating it to his own debt against the mortgagor was the person through whom the money was paid to the mortgagee. The appellant was bound to deduct the tax thereout and to account for it.

BARROWFORD HOLDINGS LTD. *v.* INLAND REVENUE COMMISSIONERS, (1939) 2 K.B. 607.

Income-tax—Finance Act (1922), S. 21 (6)—Subsidiary of foreign company—If "subsidiary company" within S. 21 (6)—Direction as to "undistributed income" of such company.

The subsidiary of a foreign company is not a subsidiary company within the meaning of the Finance Act, 1922, S. 21 (1) as amended by the Finance Act, 1927, S. 31 (3) and a direction as to undistributed profits can be made.

MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY, LTD., (1939) 2 K.B. 627 (C.A.).

Workmen's Compensation Act (1925), S. 1 (1)—Date of disablement in a case where workman dies without obtaining a certificate of disablement—Date

of death, if date of accident—Insurer—Liability to indemnify—S. 1 (1) of the Act—Effect.

A workman after nearly a year's illness died from lead poisoning (found only on *post mortem* examination) in the course of his employment. Compensation to the defendants was awarded by the arbitrator against the employer who claimed that the defendant Insurance Company were bound to indemnify them under a policy of insurance. The Insurance Company contended that the workman must be deemed to have contracted the disease which caused his death on the day when he died, eight months after the policy had expired and so not liable under the policy. The contention was negatived and the Insurance Company was held liable. The Court of Appeal affirming the decision, *held*, the injury by lead poisoning was one sustained during the currency of the policy and the insurers were liable to indemnify under the policy. The proviso to S. 1 (1) that the employer shall not be liable under the Act in respect of any injury which does not disable the workman for at least three days has no bearing on the construction of the policy (which indemnified against all sums for which the employer shall be liable in respect of any personal injury by disease as described in the Act, sustained by the workman whilst engaged in the service of the insured).

PARDY *v.* PARDY, (1939) P. 288.

Divorce—Husband and wife—Separation deed—Effect on petition for divorce based on desertion.

Where a deed of separation has been entered into in a *bona fide* spirit between the parties, the Court cannot go behind the deed to inquire into facts which brought about the real division between the spouses, and where the spouses are living apart under a deed of separation the relationship begun by consent cannot be changed into desertion by a mere refusal of one party to resume co-habitation or by breach of the covenants of the deed. Such change can be effected only by repudiation by one and acceptance as such by the other in circumstances from which the inference can be drawn that the spouse accepting the repudiation is both in a position to insist on and is in fact re-asserting conjugal rights.

GREEN *v.* GREEN, (1939) P. 309.

Divorce on ground of insanity—Person under care and treatment in house maintained by Mental After Care Association—Period of detention—If interrupted.

On the facts the association was acting as agents of the London County Council in looking after the patient and the absence on trial

of the patient from the institution did not have the effect of interrupting the period of detention and the wife was entitled to a decree *nisi* for divorce.

WILLIAMS *v.* WILLIAMS, (1939) P. 315.

Divorce—Desertion—Insanity of deserting respondent—Effect on period of desertion.

In May, 1933, the respondent deserted his wife the petitioner. On June 26, 1934, respondent was certified under the Lunacy Act (1890) and put under restraint. The present proceedings were started on January 21, 1938.

Held, desertion such as will constitute a matrimonial offence must be wilful and no man who is without a mind can be said to form an intention, and thus be guilty of a wilful act.

PARKINSON *v.* PARKINSON, (1939) P. 346.

Divorce—Dissolution of marriage on the ground of presumption of death—Absence under deed of separation—If a bar—Burden of proof.

In a petition by husband for a decree of presumption of his wife's death and dissolution of marriage, where the party has merely disappeared for a period of 7 years or upwards the fact that the wife was absent under a deed of separation does not debar the petitioner from claiming a decree. It was for the petitioner to satisfy the Court that he had no reason to believe that his wife was living within the 7 years and on the facts the husband had produced evidence which entitled the Court to give a decree *nisi*.

LYNCH *v.* LYNCH, (1939) P. 355.

Divorce—Desertion—Existence of prior petition for nullity of marriage—Enjoyment of consortium by the spouses in the belief that petition had been dismissed —Effect on period of desertion.

Where the existence of a prior petition for nullity of marriage did not affect the husband's conduct and even if he did know of it, he disregarded it for the purpose of enjoying the society of his wife, that will not constitute a bar to the wife's suit based on desertion and even if it did constitute a bar, it was a mere technicality and the Court should not exercise the discretion in favour of a deserting spouse.

EAVES *v.* EAVES, (1939) P. 361.

Divorce—Desertion—Deed of separation—Abandonment of deed by resumption of co-habitation—Effect.

R

Where (by the abandonment of a deed of separation by resumption of co-habitation) the Court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed and the wife is entitled to a decree for divorce on the ground of desertion.

JOTTINGS AND CUTTINGS.

The Late Mr. A. S. Viswanatha Aiyar.—It is with regret that we record the death recently of Mr. A. S. Viswanatha Aiyar who was for about fifteen years a reporter of this Journal. After taking his degree in Law in the Madras University, he was apprenticed to Sir P. S. Sivaswami Aiyar and then worked for some years as a junior under Mr. T. R. Venkatarama Sastri. He appeared in some very important cases with Sir Alladi Krishnaswami Aiyar. He was one of the reporters of the Law Weekly at its inception and joined as a reporter of the Madras Law Journal in 1915 and he continued as one till 1930. When the reportership of the Indian Law Reports, Madras Series, came to be filled up in 1931, he was appointed to one of the reporter's places. His work as a Law Reporter was marked by great care and thoroughness and his equipment both literary and legal was shown to its best advantage in the discharge of his duties. The learned Advocate-General and the Chief Justice of Madras paid eloquent tributes to his qualities and we respectfully join them in echoing those sentiments.

Sir John Astbury.—Time passes so quickly that it is difficult for an older reader to realise that 10 years have elapsed since Sir John Astbury, who died this week, was a Chancery Judge. Yet so it is. Astbury was a Manchester man and combined the attainments of the first-rate academic lawyer with the hard fibre and shrewd good sense of his native county. It was only just over 20 years after the date of his call that he went special on the Chancery side. His attainments in the realm of patent law made him a match even for the great Fletcher Moulton. On the Bench he was not distinguished, but will always be remembered for his decision in 1926, that a strike designed to coerce the Government is not a strike at all so as to claim the protection of the Trade Disputes Act (National Sailors, etc. *v.* Reed, 1926, Ch. 536). This bold decision was confirmed by Parliament the next year. Away from work Astbury was good company at after-dinner talks. Though at times inclined to overbear other talkers, his quick reply and versatile knowledge made him the pivot round which the wheel of conversation turned.—*L. J., 1939, p. 131.*

BOOK REVIEWS.

INDIAN STATES AND RESPONSIBLE GOVERNMENT by K. R. R. Sastry. Published by the author, Allahabad University. Price Rs. 5 —Inland, 7 *sh.* 6 *d.*—Foreign.

Mr. Sastry's book is a useful addition to the literature concerning Indian States. His statements that these are mostly medieval autocracies, whom *nemesis* will overtake should they persist in their folly, that they still exist owing to the might of the Paramount Power, that it is highly desirable that the fundamental civil rights of the people should be placed beyond jeopardy and that a minimum standard of civilised administration should be ensured for them, will find hearty approval. He is however on debatable ground when he says that he is not in favour of their abolition and that a federation alone can solve the Indian political problem. His conclusion that the Indian states have a sovereign status, quasi-international in character is not invulnerable. It is true that their territory is not British territory, that their subjects are not British subjects, that the laws of England do not apply to them and that the Indian Legislature can neither legislate for nor even discuss them. But is there not on the other side the fact that the Paramount Power has assumed power to create, abolish and abridge states, to control their external relations, protection and defence, to isolate them from one another, to exercise various kinds and degrees of extra-territorial jurisdiction within their states, to impose limitations on the powers of the latter regarding customs, salt, opium, currency and coinage, posts and telegraphs, employment of foreigners in service, etc., to control succession to states and take charge of minority administration, and to interfere in their internal affairs for the benefit of the states or their citizens, or of British India or of the Empire as a whole? To ascribe in the teeth of these facts a quasi-international status to the states as sovereign entities seems questionable. It is obvious that for sovereignty there must be a certain amount of independence, though it is quite consistent with sovereignty that the sovereign may in some respects be dependent upon another power and that there may be treaties or agreements limiting the powers of the sovereign even in internal affairs. It is curious that in the case of the Kelantan state, on facts almost parallel to those obtaining in the case of Indian States, the British Government should have regarded it as an independent and sovereign state—see *Duff Development Co.* v. *Kelantan Government* (1924) A.C. 797—whereas, in the case of Baroda they have regarded it as "not independent" but exercising various attributes of sovereignty—see *Statham* v. *Statham*, (1912) P. 92. Does not the declaration of Lord Canning in 1858, that the Crown stands "as unquestioned ruler and Paramount Power in India" suggest that

it is military strength and not cession or agreement or treaty that is the source of its power and that the states exist only by sufferance of the Crown. In the light of these facts it is certainly futile to argue with "remorseless logic in a purely legalistic vein" about the status of the states.

Apropos the treaties Mr. Sastry remarks that they are not personal (97); that they are not conveyances (99) but have the character of a contract (99). He adds that the actual relations arising thereunder have to be estimated in the light of the conditions prevailing at the time of their interpretation and not at the time when they were made (104). Will that not imply that it will be competent to the Paramount Power to enlarge their powers of interference in the internal affairs of the States, by giving an extended interpretation to the words "in the interests of the Ruler or his subjects or of British India or of the Empire as a whole"?

[End of Vol. II.]

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NOTES OF RECENT CASES.

Burn and Stodart, JJ. C. M. A. No. 157 of 1938.
29th April, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Order returning an execution petition for compliance with some conditions—If a 'final' order—Later execution petition, within three years of order—If in time.

An earlier execution petition was returned for compliance with certain conditions but the conditions were not complied with. A fresh execution petition was filed within three years of the order returning the earlier petition and the earlier execution petition was also re-presented with the fresh execution petition.

Held, an order merely returning an execution petition could not be construed as a 'final' order within the meaning of Art. 182 (5) of the Limitation Act and an execution petition filed within three years of such order is not saved from bar of limitation.

Meaning of 'final order' in Art. 182, cl. (5), discussed.

I.L.R. 36 All. 350 (P.C.), relied on.

71 M.L.J. 366, followed.

The decision in *Shanmuga Pathar* v. *Swaminatha Pathar*, 1936 M.W.N. 547, not correct.

Rao Bahadur S. T. Srinivasagopalachariar, K. Rangaswami Aiyangar, T. R. Srinivasa Aiyangar and *E. A. Visvanathan* for Appellants.

K. G. Srinivasa Aiyar for Respondents.

K.S.

The Chief Justice and Somayya, J. L. P. A. No. 26 of 1927.
1st May, 1939.

Madras Irrigation Cess Act (VII of 1865), S. 1 and proviso 3 to S. 1—Ryotwari land registered as single crop wet—Use of

water for second crop from authorised sources—Levy of water cess—Legality of—Rules framed by Government on footing that such cess could be levied—Ultra vires.

A reading of S. 1 and proviso 3 to S. 1 of the Madras Irrigation Cess Act shows that when a ryotwari holder takes water for a second crop (though the land was registered as single crop wet) from authorised sources, water cess should not be levied at all. The rules under the Act framed on the footing that such cess could be levied are *ultra vires.*

K. S. Sankara Aiyar for Appellant.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *The Government Pleader (B. Sitarama Rao)* for the Crown.

K.S.

Newsam, J. C. R. P. No. 789 of 1939.
2nd May, 1939.

Court-Fees Act (VII of 1870), Sch. II, Art. 11 and Art. 17—Madras Town Planning Act (VII of 1920)—Appeal under S. 29 against decision of arbitrator—Proper court-fee.

The decision of an arbitrator under Madras Town Planning Act is not a decree and the proceedings are not initiated by a suit and for an appeal under S. 29 (1) of the Town Planning Act to the District Judge Art. 11 and not Art. 17, Sch. II of the Court-Fees Act is applicable and a court-fee of Re. 1 is sufficient.

S. Ramachandran and *P. S. Ramachandran* for Petitioners.

T. Krishna Rao for *The Government Pleader* on behalf of the Crown.

K. S.

Patanjali Sastri, J. S. A. No. 663 of 1936.
3rd August, 1939.

Co-owners—Encroachment by strangers on a common lane—Co-owners all of them not parties to suit—Suit whether in the form maintainable—Injunction.

The plaintiff (appellant) filed a suit for injunction against defendants 1 to 4 alleging that they were encroaching upon a lane belonging exclusively to himself. The main defence was that the lane was a municipal lane. The trial Court dismissed the suit holding that the plaintiff had not made out his exclusive title to the lane. The lower appellate Court in appeal found that the suit lane belonged to the plaintiff and certain other owners on the eastern side, and the defendants who were owners of plots on the western side of the lane had no right to encroach on the suit lane. Nevertheless that Court dismissed the suit because the plaintiff based the suit on his exclusive title and the other co-owners were not made parties to the suit and observed that the plaintiff could succeed only in a properly framed suit.

Held, that an injunction could be issued against the defendants.

Held, further, that a co-owner has got a right to restrain strangers from encroaching on the common land even in the absence of the other co-owners as parties to the suit and the direction of the lower Court to the plaintiff to come again with a properly framed suit would only lead to multiplicity of actions.

I.L.R. 39 Mad. 501 and 3 L.W. 542, followed.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Appellants.

K. Swaminatha Aiyar and *C. Natarajan* for Respondents.

K. C.

Pandrang Row, J. C. R. P. No. 1609 of 1938.
11th August, 1939.

Madras Agriculturists Relief Act (IV of 1938)—Decree against father, manager of a joint Hindu family—Subsequent partition with sons—Liability of father under decree—Father insolvent—Dividend declared in insolvency—Execution against properties in the hands of the sons—Application by son under S. 20 to stay execution—Son, if entitled to apply—Son, if a debtor.

The receiver appointed in execution of a decree applied for execution of the decree against properties in the hands of the son of the 29th defendant in the suit. In the suit, the first Court by its preliminary decree decreed a particular share to the 29th defendant but on appeal the share was reduced. Pending the

appeal, certain amounts in Court were permitted to be drawn by the 29th defendant on furnishing security. In passing the final decree the Court ordered that the excess amount drawn out by the 29th defendant should be repaid by him and created a charge therefor on the properties allotted to him. The 29th defendant in 1925 had pending the suit entered into a partition. The charge was also made on the properties in the hands of the sons. In 1926 the 29th defendant became an insolvent and on 30th November, 1937, a dividend had also been declared in the insolvency before the Madras Agriculturists Relief Act had come into force. One of the sons of the 29th defendant applied under S. 20 of the Agriculturists Relief Act, 1938, to stay execution of the decree to enable him to apply under S. 19. The District Judge dismissed the application on the grounds (*i*) that this is not a debt of the son but of the father and (*ii*) that as a dividend had been declared in the father's insolvency, the son cannot hereafter apply.

Held in revision (*i*) that this is a debt within the meaning of S. 3 (*iii*) of the Act as under the Act any liability in cash or kind, whether secured or unsecured whether payable under a decree or order of a Civil or Revenue Court is a debt and it does not say by whom it should be payable. The Act is not confined to personal liability but applies to any person who becomes liable by virtue of his possession of property.

(1938) 2 M.L.J. 1068, followed.

I.L.R. (1939) Mad. 525: (1939) 1 M.L.J. 528, distinguished as a case where it was held that liability of a co-heir in management to pay excess collected by him is not a debt by virtue of S. 4 (1) of the Act;

(*ii*) that the father's insolvency and declaration of dividend therein does not affect the son's right as to the extent of his property he is the debtor and he is not insolvent;

(*iii*) that with regard to the contention that S. 20 applies only to a decree passed against a person entitled to the benefits of this Act and that it is only the 29th defendant that is such a person as the decree is passed only against him, held that the son is virtually a party to the suit as the father as manager represented his share as well.

S. V. Venugopalachariar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

K. C.

Gentle, J. Appl. Nos. 841 and 815 of 1939 in

11th August, 1939. O. P. Nos. 163 and 164 of 1938.

Company—Winding up—Creditor of company—Debtor in another transaction with others jointly and severally—If entitled to set-off his claim against the liability.

Application by Official Liquidator of the Travancore National Bank Subsidiary Company for directions as to whether a set-off should or should not be allowed,

(*a*) where a creditor of the company is also a debtor in respect of another transaction but liable jointly and severally along with other persons who are his sureties; and

(*b*) where the creditor of the company is a debtor in respect of another transaction in which he is a surety for another.

Held, that on a consideration of the bonds executed by such parties they are jointly and severally liable;

and, that a set-off ought to be allowed in both cases.

I.L.R. 45 Bom. 1219 and I.L.R. 8 Lah. 105, not followed.

12 Ves. J. 346: 33 E.R. 131, followed.

Hals. Vol. 2, p. 377 relied upon.

11 Ves. J. 29: 32 E.R. 996 and 20 Eq. 515 at 519, explained and distinguished.

R. Narasimhachariar Official Liquidator.

A. K. Sreeraman and *R. Krishnsawami* and *others* for Creditors.

S.V.V.

The Chief Justice and
Kunhi Raman, JJ. O. S. A. No. 72 of 1938.
16th August, 1939.

Torts—Malicious prosecution—What plaintiff must prove—Absence of reasonable and probable cause and malice—Defendant honestly believing plaintiff to be party to fraud—Malice negatived.

In an action for malicious prosecution the plaintiff must prove absence of reasonable and probable cause and also malice. Absence of reasonable and probable cause does not necessarily mean malice. Where it is found that defendant honestly believed that plaintiff was a party to a fraud on him there is no malice, even though it is found that he had no reasonable grounds to launch the prosecution.

8 Q. B. D. 167, relied on.

S. Ramaswami Aiyar and *I. Chakrapani* for Appellants.

T. V. Ramanatha Aiyar for Respondent.

B. V. V.

N R C

Patanjali Sastri, J. C. M. A. No. 252 of 1936 and
22nd August, 1939. S. A. No. 508 of 1936.

Civil Procedure Code (V of 1908), Ss. 146, 151 and O. 22, r. 10—Addition of parties—Suit in ejectment by a Hindu father after a suit for partition against him by his sons—Suit property allotted to the son's share pending the father's suit in ejectment—Appeal by the defendant in the ejectment suit—Application by one of the sons to be joined as respondent in the appeal—Application does not lie under O. 22, r. 10 or S. 146—S. 151 does not apply when there is a specific provision of the Code applicable to the case.

Pending a suit in ejectment by a Hindu father, the suit property fell to the shares of his sons. Subsequently the father's suit was decreed. Pending an appeal by the defendant in the ejectment suit, one of the sons to whom the property fell under the partition decree applied under O. 22, r. 10 of the Civil Procedure Code to be added as a party respondent.

Held, O. 22, r. 10 has no application to the case as the son's right was created pending the ejectment suit in the first Court and the application should have been made pending the suit and it ought not to be made pending an appeal in the suit.

A.I.R. 1934 All. 442 and A.I.R. 1935 Lah. 119, followed.

S. 146 has no application to the case, as the sons do not claim under their father under the Hindu Law.

S. 151 has no application as there is a specific procedure prescribed under the Code, namely, to apply when the suit was pending in the first Court and it was not followed by the petitioner.

K. S. Sankara Iyer for Appellant.

C. A. Seshagiri Sastri for Respondent.

K. C.

Leach, C. J.
and Kunhi Raman, J.
31st July, 1939.

C. M. P. 2506 and 2507 of 1939.

Madras District Municipalities Act (V of 1920), S. 36—Power of Provincial Government to control the action of Municipal Councils —If Courts have power to issue writ of certiorari *against the Government exercising the power.*

A Municipal Council decided to reduce the size of a tank opposite a temple which they considered insanitary; the trustees of the temple moved the Provincial Government to interfere under S. 36 of the Madras District Municipalities Act and direct the tank to be restored to its original size. The Government varied the order of the Municipal Council and directed the reduction of the tank to a smaller extent. Then the Government after hearing the Municipality cancelled its previous order. In an application for the issue of *certiorari* against the Government to quash the order cancelling the first order,

Held, the Provincial Government has full power under S. 36 of the Madras District Municipalities Act to control the action of a Municipal Council. It is impossible to differentiate between the Governor and the Provincial Government and the Court has no power to issue a writ of *certiorari.*

L. S. Veeraraghava Ayyar and *N. Srinivasa Ayyangar* for Petitioner.

The Government Pleader, (B. Sitarama Rao), K. Bhashyam Ayyangar and *V. P. Chakravarthi Ayyangar* for Respondent.

K. S.

Patanjali Sastri, J.
8th August, 1939.

S. A. No. 674 of 1936.

Suit for recovery of property—Suit based on title—If relief can be granted on the strength of possession alone of plaintiff.

Though a plaintiff bases his suit on title, relief can be given on the strength of his possession alone. In certain circumstances a decree can be passed on the strength of plaintiff's possession though it is not specifically made a ground of relief.

Case-law reviewed.

K. Rajah Ayyar for Appellant.

P. S. Narayanaswami Ayyar for Respondent.

K. S.

N R C

Venkataramana Rao and Abdur Rahman, JJ.
8th August, 1939.

Appeal No. 11 of 1936.

Mortgage—Want of proof of execution—Unsustainability of decree on mortgage—If money decree can be passed on the personal covenant in the document.

Where a mortgage deed has not been duly proved to be executed and a decree on the mortgage cannot be sustained it is open to the Court to pass a money decree on the strength of a personal covenant in the document.

I.L.R. 32 Mad. 410, followed.

Y. Satyanarayana for Appellant.

M. S. Ramachandra Rao, D. R. Krishna Rao and *C. V. Dikshitulu* for Respondents.

K. S.

Leach, C.J. and Patanjali Sastri, J.
9th August, 1939.

O. S. A. 78 of 1937.

Civil Procedure Code (V of 1908), S. 92—Trust for making advances to Anglo-Indian students for higher studies—If a public trust—Application for deviation of trust—If can be ordered in the absence of sanction under S. 92, C.P.Code.

A trust of a fund from the income of which advances were to be made to Anglo-Indian students for purposes of higher studies, repayable by them on certain terms (and secured by Insurance policies to be taken by the recipients of the advances and to be assigned to the trustees) was a public trust and an application by originating summons for an order permitting a deviation of the trust must be dismissed as the sanction of the Advocate-General under S. 92 of the Civil Procedure Code, had not been obtained.

V. Sundararajan for Appellant.

V. C. Viraraghavachari for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 481 of 1936.
26th July, 1939.

Civil Procedure Code (V of 1908), S. 34—Interest after suit—Discretion of Court—Carriage of goods—Damage to goods—Liability of carrier to pay interest on amount found due.

A plaintiff who though he refused to take delivery of the goods from the carriers on arrival at the destination because of the damage to them, is entitled to interest at the Court rate of 6 per cent. on the amount found due to him. The Court has always a discretion in awarding interest after suit under S. 34, Civil Procedure Code.

King and *Partridge* for Appellant.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Respondents.

K. S.

Abdur Rahman, J. S. A. No. 144 of 1936.
2nd August, 1939.

Mortgage—Defendant absent at final hearing—Compromise decree—Term that the absent defendant's share should be proceeded against first—Such defendant compelled to pay whole decree amount—Suit for contribution against the other judgment-debtors—If barred.

In a suit on a mortgage against *N's* father, *N* and *V*, *N's* father was absent and *V* pleaded that the mortgage was not binding on him. When the suit came on for trial *V* was not present and the plaintiff and *N* entered into a compromise under which a decree was passed for the whole amount due to the mortgagee who had however agreed to realise the decrees from *V's* share in the first instance and proceed against *N's* share only for the balance if any. When *V's* share was brought to sale by the decree-holder, *V* was compelled to pay the whole amount to save his property from sale. In *V's* suit for contribution,

Held, the prior decree based on the compromise was no bar to the suit for contribution by *V* as the Court never applied its mind to the question of the extent of the liability of *N* and *N's* father and it was not necessary in the earlier suit to decide the question of contribution *inter se*.

W. Kothandaramayya and *A. Sahasranaman* for Appellant.

T. K. Srinivasathathachari and *A. Subramaniyam* for Respondent.

K. S.
N R Ç

Abdur Rahman, J. S. A. No. 457 of 1936.
2nd August, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 87—Alteration of dates in promissory note—Plaintiff's minority enabling suit to be maintained even without the alteration—If makes the alteration immaterial—Plaintiff not guilty of any complicity—If S. 87 still applicable—Right of plaintiff to fall back on original consideration—Indian Contract Act, S. 65—Applicability.

The suit pronote was executed in favour of the minor plaintiff's deceased father and the next friend of the plaintiff was the mother an ignorant woman. The natural father appeared to have tampered with the pronote by altering the date of the pronote from 5th October, 1928 to 15th October, 1928 and the date of payment of interest from 2nd October, 1931 to 12th October, 1931. The plaintiff's claim was resisted on the ground that there was a material alteration under S. 87 of the Negotiable Instruments Act.

Held, if integrity of a contract has been broken and its identity changed either by a party to the contract or by one who is entitled to sue on it or with their connivance and possibly even when their negligence has contributed to the alteration, the instrument incorporating such a contract must be held to have been vitiated. In order to decide the material character of the alteration one will have to confine himself to the alteration and the effect it is shown to have produced on the document itself. If the legal identity of the character of the instrument have been affected or if the liability has been attempted to have been extended by the alteration it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not. The rule is intended to prevent persons from tampering with valuable securities under the penalty of not being able to found the claims on them if the alterations are found to be material.

But S. 87 of the Negotiable Instruments Act refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger particularly when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity laches or negligence may be inferred. (Corresponding provision of English Bills of Exchange Act and case-law reviewed.)

Even though the pronote may be declared to be void under S. 87 it is not inadmissible in evidence as would have been the case if the document were not duly stamped. Whatever the effect may have been if the alteration had been fraudulently made by the

plaintiff himself, the plaintiff in this case could fall back on the original consideration as the pronote was originally valid. The Court can act on the principle embodied in S. 65 of the Indian Contract Act. The plaintiff was allowed to amend his claim and get a decree.

B. V. Ramanarasu for Appellant.

B. Jagannadha Das for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. C. R. P. No. 761 of 1937.
4th August, 1939.

Insolvency—Debts of deceased father—Eldest son asking for and obtaining time for collecting outstandings and payment—If personally liable for the debts—Adjudication on such debts—Propriety.

The mere asking for and obtaining of time for payment of his deceased father's debts would not make the eldest son personally liable and if he was not personally liable he could not be adjudicated for his father's debts.

K. S. Desikan for Petitioner.

P. Govinda Menon for Respondent.

K. S.

Mockett and Krishnaswami Aiyangar, JJ. Appeal Nos. 123 and 124 of 1936.
9th August, 1939.

Defamation—Libel—Proof that words complained of were only ill-suited to the dignified position of plaintiff—Reputation of plaintiff in no way damaged—Court's view that suit ought not to have been brought—Award of one pie as damages—Absence of plaintiff from witness-box—Effect.

An untrue assertion in a pamphlet issued by a councillor criticising the administration in a municipal council ran as follows:—"A party bound to one or two individuals has taken a vow to oppose my propositions solidly". The pleading contained no innuendo and the plaintiffs did not go into the witness-box.

Though the statement is defamatory of the President and Vice-President of the Council the evidence only showed that witnesses thought those words were ill-suited to the dignified position of the plaintiff. When the leaflets were published nobody paid any attention to them and no action was taken to stop the distribution of the leaflets.

Held, in an action for libel when a plaintiff claims damages for loss of character the Court is entitled to attach the greatest

importance to the absence of the plaintiff from the witness-box. As the plaintiffs' reputation has in no way been damaged, the action ought not to have been brought at all and the damages can safely be valued at one pie as indicating the Courts view that the suit ought not to have been brought at all and each party should bear his own costs.

T. R. Venkatarama Sastri and *S. K. Ahmed Meeran* for Appellant.

K. Rajah Aiyar for Respondent.

K. S.

Pandrang Row, J. C. R. P. No. 596 of 1939.
10th August, 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Petitioner seeking to prove promissory note was in renewal of an earlier one—If Negotiable Instruments Act, Ss. 120 and 121 a bar.

A decree of 2nd May, 1936, was obtained on a pronote dated 19th February, 1933. The judgment-debtor sought to prove that the note was in renewal of a note of 1930 and as such one executed before 1st October, 1932, to which S. 8 of Act IV of 1938 was applicable.

Held, the Negotiable Instruments Act, Ss. 120 and 121 make it clear that the exclusion or estoppel is only in suits on the Negotiable Instrument, the material words being "No maker of the promissory note shall in a suit thereon be permitted to deny". It is not a general exclusion or estoppel applicable to all circumstances and to all proceedings whether based on the negotiable instrument or not.

The rule cannot apply to proceeding under Agriculturists' Relief Act, and the debt should be scaled down in accordance with S. 8.

V. T. Rangaswami Aiyangar and *S. Krishnaswami* for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K. S.

Venkataramana Rao
and Abdur Rahman, JJ. Appeal No. 218 of 1936.
10th August, 1939.

Suit for possession and mesne profits—Plaintiff deliberately letting in false evidence on question of possession—If can be deprived of mesne profits though he got a decree for possession—Discretion as to costs.

In a suit for possession and mesne profits the Subordinate Judge though he decreed possession dismissed the claim for mesne profits

and costs on the ground that plaintiff had deliberately let in false evidence on the question of possession. So far as letting in of false evidence was concerned both the plaintiff and the defendant were equally to blame. On appeal,

Held, the learned Judge was not right in disallowing the claim for mesne profits or costs though he can exercise his discretion so far as costs are concerned by disallowing a portion of the costs claimed by him.

Ch. Raghava Rao for Appellants.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

K. S.

Wadsworth, J. C. M. A. Nos. 404 and 405 of 1936.
14th August, 1939.

Civil Procedure Code (V of 1908), S. 95—Application for compensation for wrongful attachment—If setting aside order of attachment essential before such application—If averment and proof of special damages necessary for granting of compensation.

Setting aside an order of attachment is not an essential preliminary to the grant of compensation under S. 95, Civil Procedure Code. Decision in 67 M.L.J. 448 is based on *Lees* v. *Patterson,* 7 Ch. D. 866 and rules of common law. No such preliminary step is prescribed in S. 95, which alone governs the procedure in a summary application for compensation for wrongful attachment. To succeed in a claim by application under S. 95, Civil Procedure Code, special damages need not be averred or proved. On the merits no case was made out for the award of any compensation.

S. T. Srinivasagopalachari for Appellant.

N. Somasundaram for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 494 of 1936.
15th August, 1939.

Civil Procedure Code (V of 1908), O. 47, R. 1—Misapprehension of counsel in not urging all his arguments in support of a finding and consequent erroneous decision of Subordinate Judge that there were no arguments to meet points urged on other side—If error apparent on the face of the record—Review.

The misapprehension owing to which respondent's counsel did not urge all his arguments in support of the finding recorded in favour of his clients by the first Court and the consequent erroneous decision on the part of the Subordinate Judge that the counsel had no arguments to urge to meet the points raised by the appel-

lant's counsel are analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, r. 1, Civil Procedure Code.

I.L.R. 3 Rang. 261 and 49 M.L.J. 671, applied.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellants.

K. S. Sundaram for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 505 of 1936.
16th August, 1939.

Madras Act III of 1895, S. 13—Order of Collector purporting to be in exercise of appellate powers under Madras Act II of 1894—No appellate power under Act II of 1894—If order valid under general powers of revision.

An order of the Collector in a suit under Madras Act III of 1895, S. 13, though it purported to have been made in exercise of appellate powers under Madras Act II of 1894, is still valid as one made in the exercise of his general powers of revision with an order made by a Revenue Divisional Officer.

48 L. W. 289 and I.L.R. 55 Mad. 453, applied.

T. R. Arunachalam and *V. Sivaprasad* for Appellant.

N. K. Thirumalachari for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 526 of 1936.
17th August, 1939.

Civil Procedure Code (V of 1908), S. 92—Mortgage of temple properties by poojaries—Suit by villagers to set aside the alienations—Maintainability apart from S. 92—Limitation Act (IX of 1908), Art. 134-A—Knowledge of plaintiff—If refers only to plaintiffs eo nomine *on record in representative suit.*

In a representative suit by (mahajans) the villagers to set aside certain *othis* created by the poojaries,

Held, a suit against the alienee of temple property from the trustees or manager thereof can be maintained apart from the provisions of S. 92, Civil Procedure Code.

"Plaintiff" in col. 3 of Art. 134-A must in the case of a representative suit be understood to refer only to the plaintiffs *eo nomine* on record and a suit brought within 12 years of their knowledge of the alienation is not barred.

T. S. Vaithianatha Aiyar for Appellant.

G. S. Venkatarama Aiyar for Respondents.

K. S.

The Chief Justice and
Kunhi Raman, J. O. S. A. No. 73 of 1938.
17th August, 1939.

Master and servant—Dismissal—Right to dismiss servant on conviction—Dismissal on conviction—If wrongful dismissal—Setting aside of conviction on revision—If master can be compelled to take back the servant.

If a company had under the terms of employment the right to dismiss its employee when he was convicted, it could not be compelled to take the servant back into its employment when the conviction was set aside at some later date by the High Court in revision and the servant is not entitled to damages for wrongful dismissal.

King and Partridge for Appellant.

T. S. Srinivasan for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 1381 of 1936 and 947 of 1937.
18th August, 1939.

Decree against father and son—Insolvency of father pending attachment—Son's share sought to be sold in execution—Interim receiver objecting that properties were self-acquisitions of insolvent—Jurisdiction to order sale of son's interest.

A obtained a decree against *B* and *C* who were father and son. In execution he attached their properties and sought to bring them to sale. After the attachment *B*, the father put in a petition to declare himself an insolvent and an interim receiver was appointed. Thereupon *A* put in a petition to bring the half-share of *C* in the family properties, to sale. The interim receiver objected saying that the properties were the self-acquisitions of the father and that the proper Court to determine the question was the Insolvency Court. The Munsif held that he had no jurisdiction and stayed execution and directed the creditor *A* to have the question settled in the Insolvency Court. On appeal to the District Court, it was held that no appeal lay and that the Munsif was right in deciding that he had no jurisdiction.

Held, that the lower Courts were wrong in staying execution, that the District Munsif's Court had jurisdiction to proceed with the execution and that it should have directed that such right, title and interest as the son had in the properties should be sold, since the attachment put an end to the rights of the father over the son's interests in the properties.

P. N. Appuswami Aiyar for Petitioner.

S. Ramachandra Aiyar and *P. S. Ramachandran* for Respondent.

K. C.

Burn and Stodart, JJ. C. M. A. No. 31 of 1938.
1st September 1939.

Civil Procedure Code (V of 1908), O. 21, r. 16—Decree in favour of a Hindu father—Joint Hindu family governed by the Mitakshara Law—Death of the father—Sons claiming by survivorship applying to execute the decree—Sons are transferees of the decree by operation of law, within the meaning of O. 21, r. 16.

Where a father in a joint Hindu family obtained a decree and after his death his sons claiming by right of survivorship applied to execute the decree, they are transferees of the decree by the operation of law within the meaning of O. 21, r. 16 of the Civil Procedure Code, and should therefore apply to the Court which passed the decree for executing it. They are not holders of the decree along with their father within the meaning of O. 21, r. 10 of the Civil Procedure Code.

A. I. R. 1937 Pat. 607, not followed.

T. R. Venkatarama Sastri and *C. A. Seshagiri Sastri* for Appellants.

N. Sivaramakrishna Aiyar for Respondents.

K. C.

Somayya, J. C. R. P. No. 671 of 1939.
4th September, 1939.

The Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—Renewal—Explanation applies only to cases of renewal by the same debtor—Explanation does not apply to cases where a person agreed to pay the debt of another and executed a bond to the same creditor.

Where a purchaser of the equity of redemption and another executed a pronote to the creditor agreeing to pay the mortgage debt, the pronote is not liable to be scaled down as a renewal of the original mortgage debt, within the meaning of the Explanation of S. 8 of the Madras Agriculturists' Relief Act. To fall within the meaning of the Explanation to S. 8 of the Madras Agriculturists' Relief Act, the document or renewal must be by the same debtor as in the case of the original debt.

C. A. Seshagiri Sastri for Petitioner.

K. C.

Wadsworth, J. A. A. O. No. 52 of 1938.
2nd August, 1939.

Conflicting decrees—Suit for partition and a suit by creditor on promissory note by some members of family—Issue as to binding nature of debt on members who were not parties to it—Common to both suits—Common trial and separate decrees—Partition suit decree as to pronote liability reversed on appeal—Pronote decree not appealed against—If executable without regard to appellate decree in connected suit.

There were two suits, an earlier suit for partition and a later suit on a promissory note filed by a creditor against the members of the family which was to be partitioned. In both suits there was a common issue as to the binding nature of the promissory note debt upon members of the family who were not parties to the note. The two suits were by consent tried together, the creditor being a party also to the partition suit and it was found in the trial Court that the promissory note debt was binding on all the coparceners. An appeal was filed only against the decision in the partition suit and the decree of the trial Court was reversed in so far as it declared that certain debts including that on the promissory note were binding on the family and the appellate decree was confirmed on second appeal. The creditor sought to execute his decree against all the members of the family including those who had been exonerated in the partition suit. The Courts below held that the decree could be executed in spite of the appellate decree in the connected suit. On appeal,

Held:—To allow the creditor whose rights have been restricted by the partition decree to which he was a party, to execute the connected decree without regard to those restrictions is to acquiesce in the perversion of justice and in spite of the absence of an appeal in the promissory note suit the creditor should be allowed to execute only to the extent decided in the appeal in the partition suit.

K. Kameswara Rao for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

The Chief Justice and O. S. A. No. 48 of 1938.
Kunhi Raman, J.
8th August, 1939.

Letters Patent (Madras), cl. 12—Offer by despatch of telegram by buyer from Madras accepted by telegram by seller from Hyderabad for sale of goods F. O. R. Hyderabad—Rejection notified by

letter despatched from Madras—If "part of cause of action" has arisen in Madras—Leave to sue at Madras for breach of contract —If to be granted.

A contract for sale of goods (skins) F. O. R. Hyderabad was entered into by the acceptance by telegram from Hyderabad by defendant (sellers) of a counter-offer by telegram from Madras by the plaintiff (buyers) in reply to an offer by telegram by sellers despatched from Hyderabad. The plaintiffs for their convenience arranged for the forwarding of the goods *via* Karachi to Madras and on arrival at Madras rejected them as of inferior quality. The defendants denied that the goods were of inferior quality and refused to take them back. The plaintiff obtained leave to sue and filed a suit for damages for breach of contract on the original side of the Madras High Court. In an application by the defendant for revocation of the leave,

Held, that the posting of an offer or the despatch of a telegram of an offer from a particular place cannot be regarded as part of the cause of action. An offer is made at the place where it is received and the place of despatch of an offer by letter or telegram is not a material factor.

I.L.R. 58 Cal. 539, dissented. 65 M.L.J. 455, followed.

The rejection does undoubtedly form part of the cause of action but if the place of rejection is material (but it is not) it was not at Madras. It was at Madhavaram where the goods were sent for examination. Posting the letter of rejection at Madras did not make Madras the place of rejection. In this case notice of rejection must be taken to have been given in Hyderabad where the letter was received.

(1918) 1 K.B. 128, applied.

As the cause of action did not arise even in part in Madras "leave to sue" must be revoked.

B. Pocker for Appellant.

K. N. Viswanathan for Respondent.

K. S.

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The Chief Justice and Patanjali Sastri, J. C. M. P. No. 1781 of 1939.

9th August, 1939.

Civil Procedure Code (V of 1908), Ss. 152 and 34 (2)—Decree silent as to further interest from date of decree to date of realisation—Decree in accordance with judgment—If can be amended under S. 152 as accidental slip or omission—S. 34 (2)—Applicability.

Where a decree which has been drafted in accordance with a judgment contains no reference to further interest from date of decree to date of payment the Court must be deemed to have refused it. The provisions of Civil Procedure Code, S. 34 (2) govern the matter. The Court cannot under S. 152 amend the decree by allowing further interest on the decretal amount from the date of decree to payment or realization.

T. E. Ramabhadrachariar for Petitioner.

J. R. Gundappa Rao for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 6 of 1937.
15th August, 1939.

Practice—Sale by Official Receiver—Failure to mention amount of mortgage existence of which is announced—If sufficient to justify interference with sale—Provisions of Civil Procedure Code—If applicable.

The provisions of the Civil Procedure Code have no application to sales by Official Receiver and the mere omission to mention the amount of a mortgage on the property the existence of which is announced is not sufficient to justify interference with the sale.

P. Chandra Reddy for Appellant.

P. Basi Reddy for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 47 of 1937.
16th August, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Execution against judgment-debtor barred—If execution against his surety (who had given a bond when the judgment-debtor was arrested in prior execution) a step in aid of execution which will save limitation against principal debtor.

In a previous execution against the judgment-debtor a surety gave a bond binding himself that if judgment-debtor did not file an insolvency petition within a specified time he would produce the debtor before the Court or failing that he would render himself liable for the amount of the decree; and there was default and execution petition against the surety. Subsequently execution proceedings were taken against the judgment-debtor who pleaded that it was barred by limitation.

Held, in substance there is only one decree against the judgment-debtor. Under that decree the surety has by his bond fastened on himself a liability. Therefore an execution petition against the surety should be treated under the strict terms of

Art. 182 (5) as an application to take some step in aid of execution of the decree.

(1939) A.L.J. 415, I.L.R. 13 Luck. 353, I.L.R. 43 All. 152, and I.L.R. 58 Mad. 276, discussed and followed.

M. S. Venkatarama Aiyar for Appellant.

B. Govindan for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 516 of 1936.
17th August, 1939.

Limitation—Acknowledgment—Deposition by debtor in former proceedings—When acknowledgment of subsisting liability on a promissory note.

Where a deposition by the debtor in previous proceedings stating that he offered to set off the amount he was claiming against the sum due on the promissory note now sued on, as an acknowledgment saving from the bar of limitation,

Held, the surrounding circumstances should be taken into consideration in drawing any inference as to whether the debtor was acknowledging a subsisting liability when the writing relied on does not contain an express acknowledgment of such liability.

I.L.R. 50 Mad. 548, I.L.R. 45 Mad. 443 and 46 M.L.J. 1, followed.

C. A. Seshagiri Sastri for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 130 of 1937 and
17th August, 1939. C. R. P. No. 808 of 1937.

Civil Procedure Code (V of 1908), O. 40, r. 4 (as amended in Madras)—Referring party to suit against Receiver—Necessity for Court stating reasons in writing.

Under O. 40, r. 4 as amended in Madras it is obligatory upon the Court referring a party to a suit against a receiver to state in writing its reasons for the reference.

D. Ramaswami Aiyangar for Appellants.

S. S. Ramachandra Aiyar and *C. V. Ramanujachariar* for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 261 of 1938.
15th August, 1939.

Malabar Tenancy Act (XIV of 1930), S. 20—Disability to sue for eviction unless right of obtaining renewal not availed of—If can be controlled by a contract made before the Act.

Reading Ss 16, 17, 18 and 22 with S. 20, cls. (3), (5) and (6) it is clear that no eviction can take place unless the statutory right of obtaining a renewal had not been availed of on the expiry of the term and if *ex concesso* the right to obtain such renewal cannot be controlled by a contract made before the Act, the disability to sue for eviction if such renewal is obtained, cannot also be controlled by such contract.

23 M.L.J. 353, distinguished. I.L.R. 33 Cal. 136, referred to.

P. Govinda Menon for Appellant.

The Government Pleader (*B. Sitarama Rao*), *S. R. Subramania Aiyar* and *K. Raghuramayya* for Respondents.

K. S.

Wadsworth, J. C. M. S. A. No. 42 of 1937.
15th August, 1939.

Civil Procedure Code (V of 1908), Ss. 40 and 67 (2)—Rule promulgated in Coorg province embodying restrictions on sale of land in execution—If applicable to Coorg decree transferred to Court in Madras Presidency for execution.

Under S. 67 (2) of the Civil Procedure Code the Chief Commissioner of Coorg has promulgated a rule to the effect that "lands, houses and other buildings and all immovable property shall not be liable to attachment or sale in execution of decrees of Civil Courts in Coorg with the execution of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed".

Where a decree from Coorg was transferred to the Court of the District Munsif of Cannanore for execution, the question arose if the Coorg rule was applicable.

Held, the Local Government of Coorg had not the power nor is it likely to have intended to frame rules to restrict the execution of its decrees when transferred to a Court in the Madras Presidency. The rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Government of Coorg. Therefore a decree-holder can execute his decree in the Madras Presidency by the sale of land situated there in spite of the restrictions under the special rule upon its execution within the province of Coorg.

N R C

O. T. G. Nambiyar and *C. K. Kerala Varma* for Appellant.

B. Sitarama Rao for Respondent.

K. S.

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Wadsworth, J. A. A. A. O. No. 100 of 1938
17th August, 1939. and C. M. P. No. 2492 of 1939.

Civil Procedure Code (V of 1908), S. 47—Settlement of terms of proclamation—When an order, on which an appeal lies under S. 47—Madras Act IV of 1938, Agriculturists Relief Act, S. 4 (d)—Vacant ground in the compound of house mortgaged—If prevents application of S. 4 (d).

It is well established that the mere settlement of the terms of a proclamation when no dispute between the parties as to their rights or liabilities is decided judicially cannot be deemed to be an order under S. 47, Civil Procedure Code, from which an appeal would lie. But it is equally well settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided that decision, is a judicial decision and the parties will not be allowed in the Court of execution to canvass the same matter again.

Vedaviasa Aiyar v. *The Madura Hindu Labha Nidhi*, (1923) 45 M.L.J. 478, followed.

When the vacant ground included in the mortgage is a part of the compound of the house property which the mortgage covers and there is a compound wall round the vacant ground and the well serving the houses included in the mortgage, the mortgage is a debt contracted on the security of house property alone. The mere fact that the land originally bore two *paimash* numbers does not suffice to separate the compound from the house to which it is attached.

(1939) 2 M.L.J. 233, distinguished.

P. R. Ganapathi Aiyar and *K. S. Ramabhadra Aiyar* for Appellant.

K. E. Rajagopalachariar for Respondent.

K. S.

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Wadsworth, J. A. A. O. No. 114 of 1937.
17th August, 1939.

Hindu Law—Joint family—Property acquired by manager—When presumption that it is family property arises—Mortgage of such property along with item proved to be family property—If raises presumption that it is family land.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property. 48 L.W. 628, followed.

The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family.

K. Kuttikrishna Menon for Appellant.

Respondent not represented.

K. S.

Wadsworth, J. A. A. O. No. 5 of 1937.
18th August, 1939.

Mortgage—Rival purchasers under decrees on consecutive mortgages—Decree-holder in second suit not impleaded in first suit—Rights of purchasers.

The purchaser under a decree on an earlier mortgage is entitled to retain possession as against the purchaser under the decree on a second mortgage, the holder of which had not been impleaded in the earlier suit, until the first mortgage is redeemed.

I.L.R. 24 Mad. 171, followed; I.L.R. 56 Mad. 846, referred to.

R. Viswanathan for Appellant.

C. Narasimhachariar for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 1567 of 1938.
18th August, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 78—If a beneficial owner of amount due on promissory note entitled to decree on the promissory note.

Where the plaintiff claimed to be the beneficial owner of the amount for which a promissory note was executed by the second defendant in favour of the first defendant (the trial Court found that the first defendant was not a trustee in respect of the promissory note and not liable for the amount due on the promissory note) and the plaintiff claimed a decree against the second defendant,

Held, S. 78 of the Negotiable Instruments Act should be strictly construed and a valid discharge can be given only by the payee of the promissory note or the holder thereof, there being no such thing as a *benami* promissory note taken in the name of one person but really meant for the other. The plaintiff cannot have a decree.

I.L.R. 30 Mad. 88, and A.I.R. 1935 Mad. 312, followed.

V. Parthasarathy for Petitioner.

V. Viyyanna and *J. Lakshmayya* for Respondents.

K. S.

Kunhi Raman, J. C. R. P. No. 1442 of 1936.
18th August, 1939.

Civil Procedure Code (V of 1908), O. 13, rr. 1 and 2—Production of documents at a late stage—If to be allowed in the absence of reasonable explanation for non-production at proper time.

In the case of account books which are not disclosed for more than a year after the date of the first hearing, it will be unsafe to lay down a peremptory rule that they must also be permitted to be made use of by the parties concerned at a belated stage of the proceedings although there is no reasonable explanation for their non-production at the proper time.

I.L.R. 51 Mad. 472, explained and distinguished as referring mainly to certified copies of public documents which are produced at a late stage.

S. Ramaswami Aiyar for Petitioner.

T. L. Venkatarama Aiyar, S. Ramachandra Aiyar and *G. N. Rajagopalan* for Respondents.

K. S.

Abdur Rahman, J. S. A. No. 250 of 1936.
18th August, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 9—Suit on mortgage by one of the two joint tenants—If suit maintainable and if decree can be passed in the absence of the other—Death of the other pending suit and plaintiff becoming solely entitled—If decree for whole amount can be passed.

Where one of the two daughters (joint tenants) and heirs of a deceased mortgagee sued on the mortgage, objection was taken that she was not entitled to sue solely and exclusively on the mortgage bond. Pending the suit the other daughter died.

Held, the provisions contained in O. 1, r. 9 are clear enough and made it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In exceptional cases Court would refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But because of the death of the sister pending suit, plaintiff was the only person entitled to recover the whole amount at the time of passing the decree and a decree for the full amount ought to be passed, as the Court was justified in taking

notice of subsequent events (death of sister). (A compromise in a partition suit by which the other sister authorised the plaintiff to sue for the whole amount was also found valid.)

K. Rajah Aiyar, Arumugam and *Arunachalam* for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

K. S.

Somayya, J. A. A. A. O. No. 95 of 1936.
19th August, 1939.

Civil Procedure Code (V of 1908), S. 144—Restitution—Reversal of decree—Right of successful appellant to mesne profits by way of restitution—If successful party in trial Court can defeat right by saying that he had leased out the property.

Whether a successful plaintiff in the trial Court remained in possession himself or whether he leased the properties to third parties, he is liable on reversal of the decree of the trial Court to put the defendants from whom he took possession in the same position which they would have occupied but for the wrongful decree of the trial Court. One of the incidental liabilities which he incurs is certainly to pay the income which the defendants in the suit were deprived of during the period during which they were kept out of possession.

T. Ramamurthi for Appellant.

K. R. Vepa for Respondent.

K. S.

Kunhiraman, J. C. R. P. No. 986 of 1937.
21st August, 1939.

Madras Estates Land Act (I of 1908), Ss. 90 (2) and 192 (3)—Petition by landlord to get back goods alleged to have been wrongfully taken away—If proceedings to recover rent under S. 192 (3) or if tenant's resistance can be proceeding to contest distraint.

Proceedings started by a petition filed by a landowner under S. 90 (2) of the Act (to get back goods alleged to have been wrongfully taken away) cannot be described as proceedings to recover rent within the meaning of S. 192 (3), nor can such proceedings be described as proceedings to contest distraint merely because the tenant tries to resist the landlord's application by stating that the distraint was not lawful.

L. A. Gopalakrishna Aiyar for Petitioner.

K. Desikachari for Respondent.

K. S.

Wadsworth, J. A.A.A.O. Nos. 27, 28 and 39 of 1937.

21st August, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—"Final order" on a previous execution application—Meaning of "final"—If can cover the eventual result of possible appeals.

The natural interpretation of the word "final" in sub-cl. (5) of Art. 182 is as referring to the order which terminates the application as contrasted with a mere partial or interlocutory order. In the absence of any explicit provision similar to that in sub-cl. (2) of Art. 182 it is extending the meaning of the word "final" too far to make it cover the result of possible appeals.

157 I.C. 604, doubted. I.L.R. 61 Cal. 945 and I.L.R. 6 Pat. 24, referred.

A. Swaminatha Aiyar and *S. Thayagaraja Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

K. S.

The Chief Justice and O. S. A. No. 10 of 1938.
Kunhi Raman, J.
23rd August, 1939.

Civil Procedure Code (V of 1908), O. 6, r. 17—Amendment—Suit for possession of a share based on title by conveyance—Case falling to ground as conveyance unregistered and therefore inadmissible in evidence—Vendors not parties to suit—Suit for specific performance would be barred by limitation—Amendment of plaint as one for specific performance—If to be allowed.

Where the plaintiff sued for possession of a share of properties and mesne profits basing his claim on a conveyance which not being registered could not be put in evidence and his case therefore fell to the ground, an application for leave to amend the plaint by the insertion of a plea for specific performance of the agreement embodied in the unregistered conveyance, should not be granted as it will permit the suit to be converted into a suit of a different character especially as a suit for specific performance was then barred by the law of limitation.

I.L.R. 48 Cal. 110, distinguished.

V. Natesan for Appellants.

K. Venugopala Aiyangar, Srinivasa Raghavan, Thiagarajan and *Kulandaivelu Mudaliar* for Respondents.

K. S.

Wadsworth, J. A. A. O. No. 175 of 1937.
23rd August, 1939.

Provincial Insolvency Act (V of 1920), S. 51—'Benefit of execution'—If costs of suit in which there was execution in addition to costs of the execution to be retained by the executing creditor.

The analogy of S. 52 affords no justification for importing the special provision of that section which is not found in the general law relating to rateable distribution into the terms of S. 51 which has really no connection with the following section and is silent on the point. There is no reason to deduct also the costs of prosecuting the suit which has resulted in the execution, for other creditors may have incurred similar expenses in other suits.

I.L.R. 57 Mad. 330: 65 M.L.J. 402 and A.I.R. 1939 Mad. 291: (1939) 1 M.L.J. 205, discussed.

Executing creditor is entitled to a charge over the sale proceeds merely in respect of costs of execution but not in respect of the costs of the suit.

Kasturi Seshagiri Rao for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K. S.

Patanjali Sastri, J. Crl. Appeal No. 88 of 1939.
24th August, 1939.

Indian Penal Code (XLV of 1860), Ss. 304 and 334—Accused causing simple hurt under grave and sudden provocation—Death by wound turning septic—If knowledge that injury was likely to cause death can be imputed to accused by knowledge of dirt in weapon.

The accused under grave and sudden provocation struck the deceased and caused a simple injury which but for the wound turning septic later on would not have been fatal.

Held, it is somewhat far fetched to say that the accused had knowledge that by reason of the dirt on the weapon, the injury which he was likely to cause was likely to prove fatal. Conviction under S. 304, Indian Penal Code, ought to be set aside and the accused should be convicted under S. 334.

A. Bhujanga Rao for Appellant.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.
NRC

Wadsworth, J. A. A. O. No. 237 of 1937.
24th August, 1939.

Civil Procedure Code (V of 1908), S. 47—Execution proceedings—Order settling terms of sale proclamation—If res judicata *to prevent parties contending in later proceedings that amount has been wrongly calculated—Question as to overpayment in satisfaction of decree—If matter arising in execution under S. 47.*

It is impossible to contend that an order settling the terms of sale proclamation passed after notice but without any contest operates as *res judicata* to prevent parties from contending at a subsequent stage of the execution proceedings that the amount in the proclamation has been wrongly calculated.

I.L.R. 37 All. 589 and A.I.R. 1929 Mad. 903, followed.

It is well settled that a question as to an alleged overpayment in satisfaction of a decree is a matter arising in execution between parties governed by S. 47, Civil Procedure Code and no separate suit would lie.

The order of an executing Court which is a substantially just order is also one to which no technical objection can be taken.

T. S. Nagaswami Aiyar for Appellant.

V. Govindarajachari and *N. Vasudeva Rao* for Respondents.

K. S.

Wadsworth, J. A. A. A. O. No. 60 of 1937.
24th August, 1939.

Provincial Insolvency Act (V of 1920), S. 37—Attachment pending on date of adjudication—Annulment of adjudication—Effect on attachment—Dismissal of execution petition on adjudication—If raises attachment.

When there is an attachment at the time of the adjudication and the insolvency is not prosecuted with the result that an order of annulment is passed, the effect of the order of annulment will be that which is laid down in S. 37 of the Provincial Insolvency Act, that is, subject to the contingencies contemplated by S. 37 the property will go back to the debtor with any burdens which existed upon it at the time of the adjudication. His interests in the property is still bound by the attachment at the date of the annulment. An order of dismissal of an execution petition did not raise the attachment.

K. Kameswara Rao for Appellant.

A. Lakshmayya for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 68 of 1937.
25th August, 1939.

Civil Procedure Code (V of 1908), O. 9, r. 13—If optional—Constructive res judicata *in execution matters—If applicable in the absence of proper notice to person affected.*

Action under O. 9, r. 13 is optional. There can be no constructive *res judicata* in execution matters also, in the absence of a proper service on the party adversely affected.

T. L. Venkatarama Aiyar for Appellant.

D. R. Krishna Rao for Respondents.

K. S.

Patanjali Sastri, J. Crl. R. C. No. 54 of 1939.
25th August, 1939.

Madras Gaming Act (III of 1930), S. 4 (ii)—Presence at particular place for purpose of gaming—If offence.

There is a wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter that is constituted an offence under S. 4 (ii) of the Act and S. 6 cannot be invoked to sustain a conviction.

K. S. Jayarama Aiyar, G. Gopalaswami and *M. C. Rajagopalan* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Kunhi Raman, J. C. R. P. No. 1495 of 1936.
25th August, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 10—Adding parties—Suit for declaration that plaintiffs were solely entitled to hereditary right to perform archaka *service in a temple—Stranger claiming to be entitled to joint interest in those rights—If to be added as party.*

In a suit for a declaration that the three plaintiffs are solely entitled to a hereditary right to perform *archaka* service in the suit temple and to enjoy the service *inam* lands a stranger sought to be added as a party as she claimed a joint interest in those rights and contended that her presence as party was therefore necessary to avoid multiplicity of suits.

Held, this was a case in which in view of the relief claimed by the three plaintiffs the presence of the new defendant is necessary within the meaning of O. 1, r. 10, Civil Procedure Code, to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit;

I.L.R. 5 Mad. 52 and A.I.R. 1929 Mad. 443, followed.

V. Govindarajachari for Petitioner.

P. Satyanarayana Rao. for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 737, 738 and 1024
25th August, 1939. of 1937 and 212 of 1938.

Civil Procedure Code (V of 1908), O. 9, r. 13—Decree against minor who was not represented at all—If mere nullity or an ex parte *decree which can be set aside under O. 9, r. 13.*

Where the respondent was a minor not represented at all before the trial Court and could not therefore be said to have been a party to the proceedings, it cannot be said that the decree passed against him was an *ex parte* decree. The decree must be regarded as a mere nullity so far as the respondent is concerned. Such a decree cannot be set aside under O. 9, r. 13.

37 M.L.J. 399, followed. 34 L.W. 317 and 66 M.L.J. 683, referred.

R. Ramasubba Aiyar for Petitioners.

A. Viswanatha Aiyar and *V. Meenakshisundaram* for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1426 of 1936.
25th August, 1939.

Promissory note by manager or karnavan—Suit on—Decree against family or tarwad—If to be passed.

In a suit on a promissory note executed by the defendant who had signed his name *simpliciter*, the plaintiff asked for a decree personally against the defendant and also as against the *tavashi* tarwad represented by him on the ground that the promissory note represented the value of goods supplied for the needs of the *tavashi*.

Held, where the personal law allows the members of a family or tarwad to be bound by a transaction entered into on its behalf by the manager or the karnavan a decree could be passed against the family or tarwad.

K. N. Kumaran for Petitioner.

K. K. Sreedharan for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 526 of 1937.
30th August, 1939.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage by debtor within three months of adjudication—Alienation under

threat of legal proceedings and to escape liability for costs—If fraudulent preference.

In an application by the Official Receiver to annul a mortgage created by a debtor within three months of the adjudication in favour of a simple money creditor,

Held, if the dominant motive was not to prefer and if the alienation was made under threat of legal proceedings by the creditor which would saddle the debtor with costs the said alienation could not be impeached in law as a fraudulent preference.

Case-law discussed.

T. V. Muthukrishna Aiyar and *T. V. Ramiah* for Petitioner.

T. K. Sundara Raman for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 453 of 1936.
31st August, 1939.

Civil Procedure Code (V of 1908), O. 21, r. 89—Payment of money by judgment-debtor to have the sale of his property in execution set aside—Reversal or setting aside of decree—Claim for restitution—Sustainability—Indian Contract Act, S. 72—Relief under if can be awarded.

After a review of the case-law held:—None of the decisions goes the length of holding that, if a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, r. 89 to have a sale of his property held in execution set aside, the claim for restitution, made either under S. 144, Civil Procedure Code, or under the general law after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is unsustainable. Such a case would clearly be one for awarding relief under S. 72 of the Indian Contract Act.

O. T. G. Nambiar for Appellant.

C. S. Krishnamurthi Aiyar for Respondent.

K. S.

Mockett and Krishnaswami Aiyangar, JJ. A. S. No. 189 of 1936.
31st August, 1939.

Indemnity—Covenant of—Partition deed—Clause to indemnify loss in case of deficiency of encumbered property—Onus of proof.

A covenant of indemnity may be absolute and is enforceable even if actual loss has not occurred. Where a partition deed provided that in respect of the properties allotted to one party, if any undisclosed encumbrances are discovered, then the other party

should make good the deficiency or loss in respect of which the properties allotted to the other party, were made a charge.

Held, on its being discovered that in respect of the items of the properties allotted in favour of one party there were incumbrances on the said items in favour of a third party, the party can receive from the other party the full amount of the incumbrances, even though no payment was yet made to the incumbrancer.

The onus of proving that the transferee was a transferee for value without notice of the charge was on the transferee.

I.L.R. 42 Cal. 625, followed.

Quaere, whether an execution purchaser can claim as a *bona fide* transferee for value without notice under S. 100, Transfer of Property Act.

I.L.R. 13 Luck. 746, referred to.

Ch. Raghava Rao and *K. P. Kuttisankara Menon* for Appellants.

P. S. Narayanaswami Aiyar for Respondent.

K. C.

Burn and Stodart, JJ. A. A. O. No. 6 of 1938.
31st August, 1939.

Civil Procedure Code (V of 1908), O. 41, r. 6, sub-r. 2—Appeal pending against order for sale of immovable property in execution of decree—Application for stay of sale—If Court has discretion to grant or refuse stay—Refusal of stay—If illegality—O. 21, r. 64—Sale to be of property sufficient to realise amount due under decree.

Sub-r. 2 of r. 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

A.I.R. 1932 All. 551, dissented from.

The Court has no discretion in the matter of granting or refusing stay, though it has discretion in the matter of imposing terms. Refusal of stay and sale thereafter is a clear illegality and the sale must be set aside. Executing Courts have to note that O. 21, r. 64 provides that no more of the judgment-debtor's property ought to be sold than is sufficient to realise the amount due under the decree. It is also desirable to sell the property in small parcels if that will fetch a better price,

B. Sitarama Rao, R. Gopalaswami Aiyangar and *G. Thiagaraja Sastri* for Appellants.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

K. S.

Gentle, J. Application No. 399 of 1939, O.P. No. 277 of 1936 and O. P. No. 248 of 1938.
31st August, 1939.

Indian Companies Act (VII of 1913), S. 61 (4)—Share capital reduced by special resolution—Conditions—Shareholders to bring back moneys—Liquidation of Company — Liquidator's application for review of order—Amendment not correct.

Application by a Company for confirming the resolution of Company for reduction of subscribed Share Capital by paying off a portion of the Share Capital with condition that the amounts should be repaid by the shareholders whenever called upon by the Company was ordered on 11th February, 1937, by the High Court reducing the authorised capital; and on the Company being subsequently wound up on 20th October, 1938, the Liquidator of the Company moved for amendment or review of the order of 11th February, 1937, to make the shareholders to bring back the moneys refunded. On the shareholders objecting to the course on the ground that the High Court's order having been registered with the Assistant Registrar of Joint Stock Companies and the registration having been certified the same was conclusive under S. 61 (4) of the Indian Companies Act the order cannot be amended, *held* that the contention of the shareholders was right and the order could not be amended.

88 L.T. 702, followed.

V. Radhakrishnayya and *T. V. Ramayya* for Liquidator.

S. Panchapagesa Sastri, M. Krishna Bharati, S. Seshadri and *T. P. Kannabhiran* for Shareholders.

K. C.

Burn and Stodart, JJ. A. A. O. No. 49 of 1938.
5th September, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 5 and 8—If distinct and independent.

Rr. 5 and 8 of O. 21, C. P. Code, are distinct and independent.

56 M.L.J. 692, followed. I.L.R. 22 Cal. 764, dissented from.

N. Vasudeva Rao for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

K. S.

The Chief Justice and Kunhi Raman, J.
5th September, 1939.

O. S. App. No. 14 of 1938.

Will—Codicil—Mahomedan testator—Intimation to solicitors of terms of codicil—Death of testatar before codicil was executed—Final instructions to solicitors—Effective codicil—Mahomedan Law—Mode of creating will or codicil.

The testator who was a Cutchi Memon executed a will by which after granting certain legacies he provided that the income of the properties should be devoted to the education and marriage expenses of his descendants by certain sons. Subsequently when he was ill he caused a telegram to be sent to his lawyers as follows: "Since my grandson *A* died I have decided to omit all schoolfees." He also wrote a letter to his solicitor stating that he had decided to cancel his allowances provided for schoolfees. The solicitors wired back and wrote asking for specific and clear instructions regarding the codicil. The testator however died without giving any further instructions.

Held, that the telegram and the letter forwarded by the testator to his solicitors were not mere instructions to submit a draft codicil for consideration and that they amounted to an effective codicil inasmuch as no particular form was necessary to the execution of a will or codicil under the Mahomedan Law.

I.L.R. 21 All. 91 and I.L.R. 43 Bom. 641, relied on.

P. K. Janakiraman for Appellant.

V. Radhakrishnayya Instructed by *King and Partridge* for 1st Respondent.

S. Panchapakesa Sastri instructed by *T. A. Rangachari* for 2nd Respondent.

V. Subramanyam, V. Satyanarayana and *D. Narasa Raju* for other Respondents.

B. V.V.

Venkataramana Rao and App. No. 230 of 1936.
Abdur Rahman, JJ.
28th August, 1939.

Government Securities Act (X of 1920), S. 5—Beneficial ownership of Government securities—If affected by S. 5.

The provisions of S. 5 of the Government Securities Act is only for the protection of the Government, who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of Government promissory notes and securities is not affected by S. 5.

P. Satyanarayana Rao for Appellant.
Ch. Raghava Rao for Respondent.
K. S.

Wadsworth, J. A. A. O. No. 339 of 1937.
4th September, 1939.

Mortgage—Receiver appointed in a suit on a single mortgage —Amount due to the government from mortgagor in respect of Kudimaramath*—Priorities.*

In a suit on a simple mortgage a receiver was appointed over the mortgaged properties. An amount was due from the mortgagor to the Government in respect of *Kudimaramath* which had accrued due before the appointment of the receiver. In a claim for directions to the receiver to pay the amount due to the Collector,

Held, in India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The mortgagee has no charge over the rents and profits in the hands of the receiver.

Case-law considered.

Though the Court recognises an equity over other simple creditors, the claim of the Crown is paramount. And quite apart from the fact that it is a debt due to the Crown, it is a legitimate expense which the receiver should pay as an incident of his management of the property.

S. Ramachandra Aiyar for Appellant.
The Government Pleader (B. Sitarama Rao) for Respondent.
K. S.

The Chief Justice and L. P. A. No. 24 of 1939.
Kunhi Raman, J.
5th September, 1939.

Transfer of Property Act (IV of 1882), S. 108, cls. (o) and (p)—Lease for a particular purpose—If diversion to another purpose allowable.

N. R. C.

A tenant executed a lease of a plot of land in the city of Madras, for the purpose of laying out a flower garden. The tenant began constructing buildings thereon for residential purposes. In a suit by the landlord for perpetual and mandatory injunctions,

Held, that under the terms of cls. (*o*) and (*p*) of S. 108 of the Transfer of Property Act the buildings could not be allowed to be constructed. The principles of the English Law as to negative covenants are not applicable where the Transfer of Property Act applied.

3 A. C. 709 and (1912) A. C. 623, distinguished.

K. Rajah Aiyar for Appellant.

A. S. Nataraja Aiyar for Respondent.

S. V. V.

Wadsworth, J. S. A. No. 93 of 1936.
6th September, 1939.

Mortgage—Clause that principal and interest was "payable by 10th September, 1928"—Meaning of—Notice on 29th June, 1927, offering payment—Mortgagee declining to receive payment under misapprehension as to effect of the clause—Effect.

A clause in a mortgage deed made the principal and interest "payable by 10th September, 1928". On 29th June, 1927, the mortgagor sent a registered notice to the mortgagee in which he recited his previous offers to discharge the debt by paying the amount left with him and repeated the offer. The mortgagee in his reply relied on the stipulation that the principal and interest due under the deed was "payable by 10th September, 1928" and declined to receive payment before the stipulated time.

Held, to the extent to which words are ambiguous they should be read so as not to be a clog on the equity of redemption. The meaning of "payable by a certain date" must be taken to be "payable on or before a certain date". The refusal to accept payment, though *bona fide* made under a misapprehension of the effect of the instrument, was wrongful. No formal tender is necessary. There has been a valid tender and the mortgagor is not liable to pay interest subsequent to the tender.

Case-law examined and principles as to "tender" enunciated.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

V. Govindarajachari for Respondents.

K. S.

Venkataramana Rao, J. S. A. No. 398 of 1938.
6th September, 1939.

Practice—Defendants objecting that relief cannot be claimed by application and remedy was by suit—Subsequent suit—Defendant if can object to maintenance of suit.

Where the defendants having raised the objection in prior proceedings that it was not competent to the plaintiff to claim the relief he did by way of an application to that Court and his proper remedy was by way of a regular suit and get the benefit of that judgment, it was not open to them to turn round and again object to the maintenance of the suit.

K. Rajah Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 92 of 1937.
8th September, 1939.

Limitation Act (IX of 1908), Ss. 20 and 21 (2)—Decree debt—Payment by one of several joint judgment-debtors—If saves limitation as against the judgment-debtor who did not make the payment.

Where on a decree against the sons on a debt contracted by their deceased father one judgment-debtor makes payments,

Held, in this High Court at any rate, the rule is, that a joint judgment-debtor not a party to the original contract cannot be said to be included within the exception set forth in S. 21 (2) of the Limitation Act and that the general rule under S. 20 is that a payment towards a debt keeps that debt alive as against all the joint debtors unless it is covered by the exceptions set forth in S. 21 (2).

K. Srinivasa Rao for Appellant.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 898 of 1939.
8th September, 1939.

Evidence Act (I of 1872), S. 114—Letter duly posted—Presumption that it reached its destination.

The observations in *Ma Me Shin* v. *R. M. R. M. N. Chettyar Firm,* A.I.R. 1933 Rang. 76, have to be construed with reference to the context and the observations cannot override the general provision of law contained in S. 114 of the Evidence Act which

justifies a Court in presuming that a letter duly despatched by post reached its destination.

P. Govinda Menon for Petitioner.

K. S.

Wadsworth, J. A. A. O. No. 484 of 1937.
8th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 37 and 43—Death of insolvent—Annulment of adjudication subject to vesting of property in receiver till payment of a specified creditor—Later application by other creditors for modification of order so as to include their debts also—Jurisdiction of Court.

An insolvent died in jail and his son moved the Court for annulment of the adjudication on the ground (1) that no application had been made for discharge within time allowed and (2) that the debts had all been satisfied. After notice to one creditor an order was made annulling the adjudication under S. 43 and directing that the property should vest with Receiver until payment of the active creditor. Three years later two other creditors applied to the Receiver for directions to pay them dividends out of the estate. The applications were rejected. The creditors then applied for the modification of the order under S. 37 so that the properties might vest in the Receiver until all the unpaid creditors had been paid under the insolvency law.

Held, when the Court has passed a particular vesting order, restricted in a specific way, it does not retain the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets.

I.L.R. 58 Mad. 908, referred.

The power of the Court must be taken to be confined to the power to give such directions as are necessary to carry out its intention. There was no jurisdiction to make the order asked for.

V. S. Narasimhachar for Appellant.

T. M. Venugopala Mudaliar for Respondents.

K. S.

Wadsworth, J. A. A. A. O. No. 93 of 1937.
11th September, 1939.

Child Marriage Restraint Act (XIX of 1929)—Celebration of child marriage outside British India—Amount payable under decree towards bride's marriage—Marriage if opposed to public policy and payment under decree if unenforceable.

Under a decree the appellant was required to pay a sum not exceeding Rs. 1,000 towards his share of the marriage expenses of each of his sisters. The youngest sister was married and the marriage celebrated within the Hyderabad State, because it would have been illegal under the Child Marriage Restraint Act (XIX of 1929) had it been performed in British India.

Held, there is no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal.

I.L.R. 63 Cal. 1153, distinguished.

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

Venkataramana Rao and A. S. No. 429 of 1935.
Kunhi Raman, JJ.
11th September, 1939.

Will—Disposition in favour of widow—When absolute—Powers to give the properties to whomsoever the widow liked "at the time of her death"—Exercise of power by deed inter vivos—*Validity.*

A testator provided that 2/3rd of the remainder of his estate should be taken by the son to be adopted by his widow and 1/3rd to be taken by the widow. The provision in favour of the widow was as follows: "The remaining 1/3rd share shall be taken by you after the adopted boy ceases to be a minor and the same shall be enjoyed during your lifetime. Whenever necessary you shall take a sum of Rs. 2,000 for your share out of the common funds and spend the same according to your pleasure. Out of the share of the property you might get for your share a sum of Rs. 5,000 shall be utilised by the executors. Excluding these amounts the property remaining out of your share of property has been given away to you with powers of alienation by way of gift, exchange, sale, etc., so that you might give it to whomsoever you like *at the time of your death*".

N. R. C.

Held, in the circumstances the testator intended to confer on his widow an absolute estate and not a mere life estate with a power of appointment. Assuming the will confers a mere life estate with a power of appointment, it is open to the widow to exercise the power of appointment by a deed *inter vivos*.

Sugden on Powers, 8th Edition, page 210; 70 E.R. 517 and 47 L.J. 62, followed.

The expression "at the time of the death" must be given a reasonable interpretation and means "on apprehension of death". So where the widow aged 70 in apprehension of death by a settlement exercises the power of appointment in favour of her daughter it is valid and also as transfer *eo instanti* of the life estate.

V. Govindarajachari and *D. R. Krishna Rao* for Appellant.

V. Rangachari for Respondents.

K. S.

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Venkataramana Rao and Kunhi Raman, JJ.
12th September, 1939.

A. S. No. 96 of 1937.

Land acquisition—Award of compensation—Reference to Court—Right of claimant to adduce evidence as to market value.

On a reference to the Court the claimant is entitled to adduce evidence in regard to the market value and the Court cannot reject the evidence tendered on his behalf on this point, provided the claimant in making the application for reference has disputed the market value fixed by the Land Acquisition Officer.

K. Umamaheswaram for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

K. S.

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Venkataramana Rao and Abdur Rahman, JJ.
15th September, 1939.

App. No. 229 of 1936.

Civil Procedure Code (V of 1908), O. 21, r. 63—Suit by claimant based on title, whose petition objecting to attachment under r. 58 has been decided against—Burden of proof as to genuineness of sale to claimant.

The general rule that would apply to cases where the plaintiff sues on the basis of his title and the defendant raises a plea of *benami* would not apply where the question has been gone into once by an execution Court on a petition of objections under O. 21, r. 58 and directed against the claimant. If the claimant brings a suit later under O. 21, r. 63 he will have to establish that he was in possession of the property on his own behalf and not on the

judgment-debtors and that the consideration for the sale had emanated from him. Once this is established it would then be for the defendants to rebut the evidence and to show that the plaintiff's name was *benami* or the sale in his favour was fraudulent.

Case-law discussed.

Mulla's Civil Procedure Code (1st Edition), page 789 and I.L.R. 55 All. 266 and I.L.R. 5 Rang. 552, disapproved.

A.I.R. 1927 P.C. 237, explained.

35 C.W.N. 324, held to be not overruled and followed.

K. Rajah Aiyar and *S. Nagaraja Aiyar* for Appellants.

The Government Pleader (*B. Sitarama Rao*) and *K. S. Venkatarama Aiyar* for Respondents.

K. S.

Wadsworth, J. A. A. O. No. 51 of 1938.
15th September, 1939.

Civil Procedure Code (V of 1908), O. 11, r. 21—Discovery—Suspicion that relevant documents were concealed—Proper course.

Normally when a Court suspects that an affidavit of discovery conceals documents really in the possession of the person who makes the affidavit, it will not reject the affidavit or treat it as insufficient unless there are materials either in the affidavits or in documents referred to therein or in the pleadings from which the presumption may be drawn that the defendant has relevant documents in his possession which he has not disclosed. Where there is merely a suspicion as to existence of relevant documents in the hands of a party the proper course is to accept the affidavit and to allow proof in the trial of the suit that there has been a suppression of documents by the deponent and to draw an inference adverse to the deponent from such suppression if proved. The matter should not be followed up any further in the process of discovery and certainly the drastic step of striking off the defence should not be taken on mere suspicion.

V. Ramaswami Aiyar for Appellants.

S. Venkatesa Aiyangar for Respondents.

K. S.

Kunhi Raman, J. A. A. O. No. 184 of 1938.
15th September, 1939.

Provincial Insolvency Act (V of 1920), S. 35—Petitioning creditor's debt alleged to be bogus—When adjudication to be annulled.

Where a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one,

Held, unless it is shown that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court the order of adjudication cannot be annulled.

Case-law discussed.

N. Vasudeva Rao for Appellant.

V. Govindarajachari and *V. Parthasarathi* for Respondent

K. S.

Kunhi Raman, J. C. R. P. No. 1285 of 1937.
15th September, 1939.

Transfer of Property Act (IV of 1882), S. 83—Deposit in Court of money due on mortgage—Mortgage deed not deposited in Court—Proper order.

Where it is not possible for any of the respondents to deposit the mortgage deed in Court and the petitioner has paid the mortgage money into Court, the Court should not hold that the deposit is not valid and that the petition does not lie. As it is not desirable to determine the respective rights of the respondents in a summary manner the petition is to be dismissed and the petitioner referred to a separate suit and the order shall not bar the petitioner's right to claim that interest must be deemed to have ceased from the date of the deposit.

B. Lakshminarayana for Petitioner.

Respondent not represented.

K. S.

Kunhi Raman, J. C. R. P. Nos. 1658 and 1689 of 1937.
18th September, 1939.

Court-fees—Sub-mortgagee impleading his own mortgagor and also owner of property—Proper court-fee.

When a sub-mortgagee sues impleading his own mortgagor and also the owner of the property the court-fee should be paid on the amount due on the original mortgage and not merely on the amount due to himself as sub-mortgagee.

(1938) 1 M.L.J. 171, followed.

K. Desikachari for Petitioner in C.R.P. No. 1658 of 1937.

V. C. Viraraghavan for Respondent in C.R.P. No. 1658 of 1937.

M. Krishna Bharathi for Petitioner in C.R.P. No. 1689 of 1937.

The Government Pleader (B. Sitarama Rao) for Respondent in C.R.P. No. 1689 of 1937.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Patanjali Sastri, JJ. Crl. R. C. Nos. 245, 246, 298 and 340 of 1939.
19th September, 1939.

Criminal Procedure Code (V of 1898), Ss. 107 and 112—Notice under S. 107 and order under S. 112—Essentials.

It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under S. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion arrived at.

There must be information of a nature which convinces the Magistrate that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. If the information is reliable the Magistrate has jurisdiction to make the order required by S. 112.

K. S. Jayarama Aiyar, G. Gopalaswami, S. R. Subramanian and *N. Somasundaram* for respective Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Kunhi Raman, J. C. R. P. No. 1673 of 1937.
19th September, 1939.

Civil Procedure Code (V of 1908), O. 47, r. 1—Advocate not arguing some issue as a result of not remembering certain facts—Review if to be allowed.

It is obvious there will be no finality to the decision of a Court if after judgment is pronounced the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. So long as the case does not fall within the purview of O. 47, r. 1 it will not be correct to allow an application for review.

M. S. Ramachandra Rao for Petitioner.

V. Rangachari for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 159 of 1938.
20th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 53 and 54—Mortgage by insolvent and his minor brother—Insolent's share alone liable to be set aside.

On the adjudication of a person as insolvent, the Official Receiver applied under Ss. 53 and 54 of the Provincial Insolvency Act to set aside *in toto*, a mortgage executed by the insolvent for himself and for his minor brother and the document being set aside *in toto*,

Held, that the Official Receiver was entitled to have a document set aside only to the extent of the insolvent's share and not in respect of the share of the insolvent's minor brother.

M. Krishna Bharati and *S. Seshadri* for Petitioner.

Respondent not represented.

K. C.

Kunhi Raman, J. C. R. P. No. 1304 of 1938.
20th September, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 8—Representative suit—Compromise signed by one of the plaintiffs—No proof of consent of other plaintiffs—If binding on the entire community.

There is no principle of law according to which parties to a private compromise out of Court can bind their entire community without express authority. Where one of the plaintiffs to a representative suit has signed the compromise and there is absolutely no proof that the other plaintiffs consented to the arrangement settled at the meeting of certain other members of the community, the compromise is not binding on the entire community.

A.I.R. 1936 All. 1, followed.

B. Pocker for Petitioner.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 293 and 294 of 1938.
21st September, 1939.

Civil Procedure Code (V of 1908), O. 17, rr. 2 and 3—Defendants appearing and filing written statements, and issues framed, suit part heard and adjourned for further evidence—Failure of defendants to appear on the adjourned date—Finding on all issues and decree in favour of plaintiff—Whether decree ex parte *and falls under r. 3 or r. 2 of O. 17.*

Where in a suit the defendants appeared and filed written statements and issues were framed, the suit part heard and then adjourned for further evidence and on the defendants failing to appear on the adjourned date the Court considered the merits of the case and decided all the issues that were framed for determina-

tion in the suit, the case is one falling under O. 17, r. 3 and not r. 2.

N. D. Varadachariar and *R. Viswanatha Aiyar* for Petitioner.

Respondent not represented.

K. S.

Patanjali Sastri, J. S. A. No. 538 of 1936.
22nd September, 1939.

Madras Estates Land Act (IX of 1908), S. 112—Rent sale without service of notice personally on the pattadar—Effect.

Want of personal service on the defaulter renders the rent sale null and void unless there is proof that such service was not practicable.

I.L.R. 57 Mad. 255, followed.

K. V. Sesha Aiyangar for Appellant.

T. S. Venkatesa Aiyar and *K. Venguswami Aiyar* for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. M. P. No. 2543 of 1939.
27th September, 1939.

Madras Debt Conciliation Act (XI of 1936)—Order of Debt Conciliation Board without jurisdiction—Quashing by writ of certiorari.

Respondent claiming to be an agriculturist filed an application under S. 4 (1) of the Madras Debt Conciliation Act, 1936, before the Debt Conciliation Board. Three debts were shown all of them due to the petitioner. The board decided that the debts should be scaled down under Madras Agriculturists Relief Act though the petitioner objected. In an application for issue of a writ of *certiorari* against the Debt Conciliation Board for quashing the order,

Held, S. 4 provides that a debtor may make an application for the "settlement of his debts". But if creditors representing more than 50 per cent. of the applicant's debts do not agree the board is bound under S. 17 of the Act to dismiss his application. The order of the board is without jurisdiction and must be quashed.

Ramanujam and *Venkateshayya* for Petitioner.

D. R. Krishna Rao for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 328 of 1938.
28th September, 1939.

Jaina Succession Act (V of 1928), S. 4, explanation—If excludes property held in tenancy in common.

The explanation to S. 4 of the Jaina Succession Act, 1928, does not exclude property held in tenancy in common. So where a person held an undivided moiety of an item of property as the sole member of his branch of the family, without any one else being interested in it as a member of his family, that moiety falls within the purview of S. 4 of the Act.

K. Y. Adiga and *S. Ramayya Nayak* for Appellants.

M. K. Devaraj for Respondents.

K. S.

Kunhi Raman, J. C. R. P. No. 549 of 1936.
29th September, 1939.

Contract—Obligation to pay for benefit conferred by plaintiff—When arises on an implied contract.

It is only if the person alleged to have been benefitted had the option of accepting or rejecting that benefit and chose to adopt the former course that he can be made to pay for that benefit on the basis of an implied contract.

33 L.W. 284 and I.L.R. 33 Mad. 41: 19 M.L.J. 627, followed.

A. V. Narayanaswami Aiyar for Petitioner.

L. A. Gopalakrishna Aiyar and *M. S. Vaidyanatha Aiyar* for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 316 of 1939.
4th October, 1939.

Regulation XI of 1816, S. 10—Order of village headman under—If subject to appeal or revision by High Court.

The order of the village headman under S. 10 of Regulation XI of 1816 was not subject to appeal or revision except under S. 107 of the Government of India Act, 1915, and cl. (2) of S. 224 of the Government of India Act of 1935 excludes the jurisdiction of the High Court in such cases

A. V. Narayanaswami Aiyar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Venkataramana Rao and A. S. No. 62 of 1936.
Abdur Rahman, JJ.
23rd August, 1939.

Negotiable instruments—Letter of guarantee not stamped—When a negotiable instrument—Admissibility in evidence.

A and *B* executed a promissory note in favour of a firm *X* on 28th January, 1930, agreeing to pay compound interest at Re. 1-0-6 per cent. per month. On the same day they also wrote a letter to the firm *X* agreeing to pay an enhanced interest at Re. 1-14-6 per cent. per month from 27th October, 1930, if the money borrowed on the security of the promissory note remained unpaid by the 26th October, 1930. In addition *C* also wrote to firm *X* an unstamped letter headed "Letter of guarantee written and given in favour of firm *X* by *C*, which after reciting the borrowing by *A* and *B* said "I shall pay the said amount of principal and interest inclusive of the chit interest wherever and whenever you demand without reference to the said *A* and *B*. This is the letter of guarantee written and given with consent". The promissory note was endorsed in favour of the plaintiff and the letter of guarantee was also assigned by a separate document to the plaintiff who sued *A*, *B* and *C*. As to *C's* liability,

Held, the letter of guarantee cannot be held to have been intended by the parties or regarded by businessmen in general to operate as a promissory note. It was a letter of guarantee and could be admitted in evidence on payment of a penalty and *C* was liable under it.

K. Subba Rao and *P. V. Rajamannar* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *A. Lakshmayya* for Respondent.

K. S.

Abdur Rahman, J. S. A. No. 209 of 1936.
25th August, 1939.

Registration Act (XVI of 1908), S. 17, cl. 2—Receipt by original mortgagee accepting a lesser amount in full satisfaction (portion of it paid immediately and a small portion to be paid shortly) and "waiving" the claim for the balance due—Want of registration—Effect on admissibility in evidence.

A mortgagee entered into an agreement with the purchaser of the mortgaged properties to the effect that he would accept a certain amount (portion of which was to be paid shortly after) in full satisfaction and "waived" the balance of the sum due "out of grace", and executed a receipt incorporating the terms of the agreement. The receipt was not registered. The portion of the amount

N. R. C.

was not paid as agreed and the mortgagee assigned the rights to a third person who assigned it over to the plaintiff. In a suit on the mortgage the purchaser of the properties relied on the receipt relinquishing the balance due under the mortgage.

Held, when a document is not a receipt of money but something more and does not come within the ambit of exception (*xi*) to cl. 2 of S. 17 of the Registration Act, it would require registration to be admissible in evidence for the simple reason that it is a document which purports or operates to limit or extinguish either in present or in future a right, title or interest of the value of more than Rs. 100 to or in the mortgaged property. There is a distinction between a receipt of money and relinquishment of a claim by a creditor.

I. L. R. 35 All. 202 and 34 M. L. J. 79, followed.

I. L. R. 43 Mad. 803 (806), distinguished.

D. Ramaswami Aiyangar for Appellant.

V. T. Rangaswami Aiyangar, K. Ramaswami Aiyangar and *P. S. Kodandapani* for Respondents.

K. S.

Mockett and Krishnaswami Aiyangar, JJ. A. S. Nos. 10 and 205 of 1937 and C. M. P. Nos. 944 and 2595 of 1937.

30th August, 1939.

Evidence Act (I of 1872), S. 13—Prior proceedings on the question of existence of right to office or property—Relevancy of transaction by which right was recognised—Practice—Official records—Late production—Propriety of rejection.

Previous proceedings on the question of the existence of the plaintiff's right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issues before it, leave should not ordinarily be refused even though they are produced late.

I.L.R. 56 Cal. 1003 at 1011, referred.

P. Somasundaram, S. Ramamurti and *V. Govindarajachari* for Appellant in App. Nos. 10 of 1937 and 205 of 1937.

J. Krishnamurthi for Respondent in both Appeals.

K. S.

The Chief Justice and Kunhi Raman, J. O. S. A. No. 19 of 1938.

4th September, 1939.

Private International Law—Foreign adjudication—Vesting of movables—Attaching creditors—Rights of—Civil Procedure Code (V of 1908), Ss. 64 and 73—Effect.

In the case of a foreign adjudication, the receiver of the foreign Court is entitled to the free assets of the bankrupt. The free assets must include assets which are not required to meet a charge or an attachment in existence at the time of the adjudication. Ss. 64 and 73 of the Civil Procedure Code cannot override this rule of private international law. As the foreign receiver is entitled to all the movable assets of the insolvent which were free at the date of the adjudication and the free assets must be deemed to be the moneys left over after the satisfaction of the claim of the creditors who had attached before the adjudication appellants are not entitled to anything by reason of their attachment, after adjudication. The adjudication prevented the attachment having any validity and they were left merely with the right to prove in the insolvency.

Case-law examined.

K. Krishnaswami Aiyangar, A. Seshachariar, P. Chakrapani and *T. G. Raghavachari* for Appellant.

C. Vasudevan for Respondent.

K. S.

Pandrang Row and Krishnaswami Aiyangar, JJ. C. M. P. Nos. 2793 and 3534 of 1939.
15th September, 1939.

Practice—Review—Point raised for first time—Point not well settled and it cannot be said that the contentions would straightaway have been accepted if they had been put forward at the hearing—If ground for review.

Where the points sought to be raised for the first time by way of review are debatable, it is impossible to say that there is any error of law apparent on the face of the record which can be a ground for review.

K. Krishnaswami Aiyangar for *R. Sundaralingam* for Petitioner.

K. S.

Wadsworth, J. A. A. O. No. 596 of 1938.
22nd September, 1939.

Civil Procedure Code (V of 1908), O. 38 and O. 40—Allegation that defendant has no property and is trying to alienate all the property he has and remove to Northern India—Appointment of such defendant as receiver and order for security—Propriety.

Where the basis for requiring a defendant, appointed to be a receiver, to give a security is an allegation that he has no property and is trying to alienate all the property which he has got and remove to Northern India, such allegations might justify an order

under O. 38, but have no real bearing on the question arising under O. 40. Where in the circumstances of the case there are no grounds for disturbing a party's possession it is improper even to make that party himself a receiver.

V. Rangachari fro Appellant.

K. Kameswara Rao for Respondent.

K. S.

Burn and Stodart, JJ. A. A. O. No. 69 of 1938.
28th September, 1939.

Hindu Law—Family business—Debts—Coparcener's liability—Nature and extent.

Provincial Insolvency Act (V of 1920), S. 6 (d) (ii) *and* (iii) *—Act of insolvency by managing member of Hindu family business—Adjudication of other coparceners—When valid.*

In the case of a family business those members only are personally liable for the debts of the business who are in control and management of it or who have acquiesced in the course of the business in which the particular contract was entered into, so as to warrant their being treated as parties to the contract. In the case of other members business debts are on exactly the same footing as other family debts. If they are lawfully incurred for the benefit of the family or for the necessary purposes of the family then to discharge them the family property may be sold without excluding the interest therein of the coparceners who were not parties to the contract. But they cannot be levied from the latter in any other way.

Case-law reviewed.

So where the only liability of the coparceners sought to be adjudicated insolvents arises out of the fact that the debt was contracted in the course of a family business and assuming property of the family may be sold to discharge it without excluding the coparcener's interest in that property.

Held, the relation of debtor and creditor did not exist between such coparcener and the petitioning creditor and he cannot be adjudicated insolvent. If for the debts lawfully incurred by a family manager in the ordinary course of business the other members are not personally liable much more are they exempt from the consequences of acts done by the manager which amounts to acts of insolvency.

Case-law reviewed.

V. S. Narasimhachar and *M. Guruswami Aiyar* for Appellant.

D. R. Krishna Rao and *Ch. Raghava Rao* for Respondents.

K. S.

Burn and Stodart, JJ. A. A. O. No. 449 of 1938.
4th October, 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 10—Order merely deciding that Act applicable—If appealable—Scaled down decree—Appealability.

An order which merely decided that S. 19 of Act IV of 1938 is applicable and does not apply it scaling down the decree, is not an appealable order. If the lower Court scales down the decree an appeal would lie from the new decree to be passed.

P. Satyanarayana Rao for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K. S.

Lakshmana Rao, J. Crl. App. No. 293 of 1939.
6th October, 1939.

Criminal trial—Procedure—Prosecution story on the face of it improbable—Omission to put it to jury and ask them to give benefit of doubt to accused—If material misdirection.

Where the prosecution story is on the face of it improbable, it should have been put to the jury. Further the jury should have been told that if they felt any reasonable doubt as to the guilt of the accused or any of them they should give the benefit of the doubt to the accused concerned. An omission to do that amounts to a material misdirection.

1 M.L.T. 350, followed.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

Stodart, J. C. R. P. No. 273 of 1939.
6th October, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 25—Judgment-debtor filing successive applications for conciliation—If entitled to obtain stay under S. 25 more than once.

Though in the Debt Conciliation Act there is nothing to prevent a debtor filing one application after another and under S. 25 of the Act he can obtain stay of a suit or other proceedings so long as an application is pending before the board, a judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once.

P. S. Ramachandran and *K. R. Krishnaswami* for Petitioner.

K. S.

Wadsworth, J. S. A. No. 332 of 1936.
9th October, 1939.

Civil Procedure Code (V of 1908), O. 7, r. 1 (h) and O. 2, r. 2—Suit on mortgage relinquishing a portion of the amount due—Plea of discharge as to a certain amount—Plaintiff if entitled to adjust the amount from amount so relinquished.

Plaintiff claiming Rs. 992-8-0 on a mortgage bond executed by defendant sued to recover only Rs. 500 relinquishing the balance. Defendants' plea of discharge for Rs. 230 with interest was accepted by both lower courts. Still a balance of Rs. 312-9-3 was left under the suit claim made up of Rs. 64-4-0 principal with interest thereon from date of bond. Both the lower courts negatived the right of plaintiff to adjust this amount of Rs. 312-9-3 from the amount relinquished by plaintiff and dismissed the suit.

Held, in modification, on appeal, that plaintiff was entitled to so adjust, but in as much as he specifically relinquished interest as such in plaint, he is entitled to a decree for the principal of Rs. 64-4-4 only and dismissed the rest of the plaintiff's claim.

8 I.C. 943: 8 M.L.T. 436, referred.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

K. Ramamurty and *K. Someswara Rao* for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 261 of 1939.
10th October, 1939. Crl. R. P. No. 241 of 1939.

Cattle Trespass Act (I of 1871)—Compensation to complainant deprived of the use of his cattle—If cannot be awarded unless claimed in the complaint.

Where the complainant was deprived of the use of his cattle there is no restriction in the Cattle Trespass Act that compensation cannot be awarded unless it is claimed in the complaint.

M. A. Krishnamachari for Petitioners.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

V. Rajagopalachari for Complainant.

K.S.

Wadsworth, J. C. R. P. No. 1077 of 1937.
15th September, 1939.

Civil Procedure Code (V of 1908), S. 152—Scope—Consent decree—Terms alleged to be omitted in—If can be corrected as accidental slip under S. 152—Amendment of decree—Error as to jurisdiction—Remedy by way of appeal available—Discretion to interfere in revision.

S. 152, Civil Procedure Code, does not empower a Court to rectify a decree merely because that decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under S. 152 relate only to arithmetical mistakes or errors arising from an accidental slip or omission. It is impossible to hold long after the event (18 years after the decree) that when there is an apparent omission of an important term from a judgment proceeding on the consent of parties this term has been omitted by an accidental slip. Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available but in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so.

I.L.R. 24 Mad. 646, doubted.

31 M.L.J. 438, applied.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 124 of 1937.
18th September, 1939.

Partnership Act (IX of 1932), S. 69—Decree on promissory note passed without contest—Execution of decree—Objection that decree not valid as plaintiffs were members of unregistered firm—If can be taken in execution.

In bar of execution of a decree passed without contest on a promissory note (dated 15th March, 1933, the plaint in which was filed on 27th June, 1935) the defendant raised the objection that the suit was bad and the decree a nullity because the plaintiffs at the time of the filing of the suit constituted an unregistered partnership.

Held, the suit out of which the decree arose is not one barred under S. 69 of the Partnership Act as S. 74 excludes from the operation of the Act remedies accruing before the commencement of the Act. Any lack of jurisdiction which may have existed in the Court which passed the decree could only be ascertained with

N. R. C.

an amount of research and investigation which would be beyond the functions of an executing Court. Where the executing Court had an apparently good decree to execute, it is not entitled to go into an elaborate enquiry into the legality of that decree,—an enquiry which demands the adducing of evidence which was not put before the trial Court before which the objection should have been raised.

Ch. Raghava Rao for Appellant.

E. Vinayaka Rao for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 10 of 1938.
20th September, 1939.

Civil Procedure Code (V of 1908), S. 47—Decree for maintenance—Execution sale of charged properties—Surplus after satisfying decree—Order for disposal—If appealable under S. 47, Civil Procedure Code.

There was a decree for maintenance declaring a charge as against judgment-debtors. The judgment-debtors subsequently created a mortgage upon which a suit was filed and the mortgagees purchased the property in execution of the mortgage decree. Thereafter the maintenance decree was executed by the sale of the same property and a balance was left over from the sale proceeds after satisfying the maintenance decree. The balance was claimed by an assignee from the original judgment-debtors and also by the mortgage decree-holders who had purchased the property. The latter was held entitled to the balance and the former appealed.

Held, the dispute is not one between parties arranged on opposite sides in the suit the decree of which was being executed. S. 47 therefore does not apply and no appeal lies.

K. Bhimasankaran for Appellant.

D. Narasaraju for Respondent.

K. S.

Pandrang Row and Abdur Rahman, JJ. C. R. Ps. Nos. 224 to 228, 372 to 375 and 588 of 1939.
20th September, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Decrees of Berhampore Court—Transfer of Berhampore to new Province—Execution continuing in Berhampore Court—Applicability of Madras Act IV of 1938—Jurisdiction of executing Court to hear applications under Ss. 19 and 20.

Petitions under Ss. 19 and 20 of the Madras Agriculturists Relief Act (IV of 1938) must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come with in matters covered by S. 47 of the

Civil Procedure Code and must be presented in the Court in which the execution petition was pending (here, the Berhampore Sub-Court) and not in the Court in whose jurisdiction some of the properties covered by the mortgage decree is situated.

Madras Agriculturists Relief Act has to be applied and its provisions enforced by the Berhampore Sub-Court (now in Orissa Province) in dealing with petitions under the Act so long as the execution application continues to be pending in the Court.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) with *B. V. Ramanarasu* and *P. S. Raghava Rama Sastri* for Petitioners in C. R. P. Nos. 372 to 375 of 1939 and for Respondents in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

B. Jagannadha Das for Respondents in C.R.P. Nos. 372 to 375 and for Petitioners in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

K. Ramiah Pantulu for Respondent in C. R. P. No. 225 of 1939.

K. S.

Kunhi Raman, J. C. R. P. No. 704 of 1936.
22nd September, 1939.

Practice—Amendment—Suit on pronote by two defendants—Defence that one defendant did not affix his mark—Amendment of plaint as on original cause of action—Propriety.

In the course of the trial probably because the evidence showed that the second defendant's defence that he did not insert his mark to the suit promissory note was likely to be accepted by the trial Court, an application was made for amending the plaint to base the suit on the original cause of action. The application for amendment was allowed and subsequently the trial Court found that the suit promissory note was executed only by the first defendant and that the second defendant's mark was a forgery. A decree was passed against the first defendant.

Held, in the special circumstances the amendment that was allowed was not opposed to law.

L. A. Gopalakrishna Aiyar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 469 of 1937.
22nd September, 1939.

Transfer of Property Act (IV of 1882), S. 65 (A)—Lease by mortgagor for two years for advance payment of rent—If binding on mortgagee—Transfer of Property Act, S. 65 (A)—Effect and

applicability when mortgages anterior to amending Act but leases of 1936.

Leases granted by the mortgagor in return for an advance payment of two years' rent has the effect of diminishing the security, for, any attempt to enforce the right of the mortgagee by sale would if the lease were valid result in a lower sale price than would be realised if the purchaser could anticipate the enjoyment of all future income. Apart from S. 65 (A) of the Transfer of Property Act the leases do not bind the mortgagee. S. 65 (A) applies, the leases being dated 1936 though the mortgage itself was anterior.

S. Venkatesa Aiyangar for Appellant.

C. Srinivasan for Respondent.

K. S.

Burn and Stodart, JJ. A. A. O. No. 96 of 1936.
27th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 53 and 54—Fraudulent preference—What constitutes.

Under Ss. 53 and 54 of the Provincial Insolvency Act it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent.

A.I.R. 1938 Mad. 285, approved.

So where there was nothing to show that the transferee was acting otherwise than in good faith, the application to set aside a transaction as fraudulent preference as voidable under S. 54 must be dismissed.

K. Rajah Aiyar and *R. Ekambaram* for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Wadsworth, J. S. A. No. 640 of 1935.
27th September, 1939.

Mortgage—Usufructuary mortgage—Covenant that "after the expiry of the period in any year, giving intimation in Panguni, I will pay the money in the month of Chitrai and redeem the properties"—Construction.

An othi contained the following sentence: "After expiry of the period in any year giving intimation in Panguni, I will pay the money in the month of Chitrai and redeem the properties".

Held, the proper construction of this clause is to read it as principally conveying a limitation upon the mortgagor's right of redemption after the expiry of the period fixed, the limitation

being that in any year in which he wishes to redeem he shall only do so by first giving notice in the month of Panguni and then tendering the money in the month of Chitrai. The clause was for the benefit of the mortgagor subject to a restriction in favour of the mortgagee limiting the right of redemption to a particular time of the year.

T. K. Sundararaman for Appellant.

T. E. Ramabadrachariar for Respondents.

K. S. ———

Wadsworth, J. S. A. No. 593 of 1935.
28th September, 1939.

Madras Estates Land Act (I of 1908)—Estate under—Accretion to holding by alluvion—Whether belongs to ryot *or landholder—Person in possession of accretion without title—If a* ryot *and if entitled to benefit of explanation to S. 6, sub-S. 2 of the Act—Ejectment of such person—If to be for grounds under S. 153—S. 163—Applicability.*

In an "estate under Madras Estates Land Act, accretion to land by alluvion will be an addition to the estate of the person who owns the soil and not to the estate of the person who has merely a right of occupancy in the soil. The owner of the occupancy right in respect of such accretion will not fall within the definition of a *ryot*. Nor can he have the benefit of the explanation to S. 6, sub-S. 2 of the Madras Estates Land Act, for they have not been admitted to possession nor has payment been recovered from them. They are liable to ejectment under S. 163 and the land must be held to be ryoti land situated within an estate and the tenants are not entitled to resist ejectment.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellants.

S. Muthiah Mudaliar for Respondent.

K. S. ———

Stodart, J. C. R. P. No. 1529 of 1938.
6th October, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 9—Debts incurred on or after 1st October—Interpretation.

The expression '*incurred*' must be held to apply to the inception of the debt, that is, it must refer to the time when the original obligation was created and not the principal amount as last found due plus interest on that from the date when it was found due.

K. Umamaheswaram for Petitioner.

K. S. ———

Patanjali Sastri, J. S. A. No. 491 of 1936.
6th October, 1939.

Trade name—Passing off—Name acquiring secondary significance denoting plaintiff's goods—Defendant trading under same name—Infringement—Dissimilarity in get up—How far a protection.

Where it is found that the appellant has been trading under a name which does not represent the truth and by marking his goods with a seal which is a colourable imitation of the seal which the respondent was using and by using the name "Shanmugham" (which has acquired a secondary significance as exclusively denoting the respondent's beedies) in the designation of the appellant's goods as "Shamugham seal beedies" he wants to deceive the public.

Held, where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get up is immaterial and afford no protection. 83 L.T. 259 and (1913) 2 Ch. D. 545, followed; and an injunction must be ordered restraining the use of such name without taking reasonable precaution to clearly distinguish the business carried on or beedies manufactured or sold by the defendants from the business carried on and the beedies manufactured by the plaintiff.

K. R. Rangaswami Aiyangar for Appellant.

K. Venkateswaran for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 407 of 1939.
10th October, 1939. Crl. R. P. No. 376 of 1939.

Indian Penal Code (XLV of 1860), Ss. 323 and 352—Trial for offence under—If barred by conviction under S. 75 of the City Police Act (Madras Act III of 1888).

The conviction under S. 75 of the City Police Act is no bar to the trial for an offence under Ss. 323 and 352 of the Indian Penal Code.

K. V. Rajagopalan and *S. V. Rama Aiyangar* for Petitioners.

K. M. Balasubramanyam for Complainant.

The Crown Prosecutor on behalf of the Crown.

K.S.

Wadsworth, J. A. A. A. O. No. 136 of 1937
20th September, 1939. and C.R.P. No. 828 of 1937.

Civil Procedure Code (V of 1908), O. 21, r. 53 (3)—Attaching decree-holder—If entitled to make an adjustment of the attached decree and record satisfaction under O. 21, r. 2.

The attaching decree-holder is not the representative of the holder of the attached decree for all purposes. The only safe way of interpreting O. 21, r. 53 (3) is to treat the holder of the attaching decree as the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule namely the purpose of execution and the attaching decree-holder cannot exercise the power conferred under O. 21, r. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a staisfaction of the decree.

A.I.R. 1937 Cal. 468, followed.

P. S. Ramachandran and *S. Ramachandra Aiyar* for Appellant.

K. T. M. Ahmed Ibrahim for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 21 of 1938
21st September, 1939. and C.R.P. No. 151 of 1938.

Limitation Act (IX of 1908), S. 18—Application under Civil Procedure Code, O. 21, r. 90 to set aside sale time barred—Limitation Act S. 18—Conditions for applicability.

It was found that the decree-holder did take part in a fraudulent conspiracy which had the effect of keeping the judgment-debtor from knowledge of the sale. In an application which was time barred to set aside the sale,

Held, the conditions which have to be proved for the purpose of Civil Procedure Code, O. 21, r. 90 cannot be taken as governing the conditions which have to be proved in order to attract the provisions of S. 18 of the Limitation Act. Limitation Act, S. 18 should be read as it stands and should not be modified or weakened by importing into it considerations taken from another provision of law with which it is entirely unconnected.

When a judgment-debtor seeks to save limitation (under S. 18, Limitation Act) for an application to set aside a sale, which application is directed not only against the decree-holder but also against the auction-purchaser, he must prove that he has been kept from knowledge of his right to apply by a fraud to which both the decree-holder and the auction-purchaser are either parties or accessories.

N. R. C.

V. Rangachari for Appellant.

N. Vasudeva Rao and *P. Satyanarayana Rao* for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. S. A. No. 1082 of 1934.
27th September, 1939.

Madras District Municipalities Act (V of 1920), S. 61 (1)—Private drains—If vest in Municipal Council—Municipal Council if can sanction connection of drains of other persons to private drains.

S. 61 of the District Municipalities Act does not give the Municipal Council the right to connect or sanction the connection of a stranger's drainage system with that of a person whose own private property it is.

V. N. Venkatavaradachariar for Appellant.

K. Sankara Sastri for Respondent.

K. S.

Kunhi Raman, J. A. A. O. No. 219 of 1937.
29th September, 1939.

Amendment—Suit for recovery of possession of property purchased at a court sale from defendant alleged to be trespasser—Defendant found to have purchased equity of redemption—Amendment converting suit into one for sale of the property—If to be allowed.

A suit was filed by plaintiff as purchaser in Court sale for recovery of property and mesne profits from defendant as trespasser. It was found that the defendant had purchased the equity of redemption in respect of the suit property. The lower appellate Court without going into the merits of the case gave leave to the plaintiff to amend the plaint in order that the suit might be converted into a suit for sale of the property in the possession of the defendant.

Held, that the order directing the amendment of the plaint to make it a suit for sale is not correct as it alters the cause of action in the suit.

I.L.R. 59 Mad. 312, distinguished.

A. Lakshmayya for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondent.

K. S.

[F. B.].

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
2nd October, 1939.

S. A. No. 318 of 1935.

Limitation Act (IX of 1908), S. 21 (1).—Hindu Law—Paternal grandmother of minor—If "lawful guardian."

Neither by Hindu law or custom is the grandmother recognized as the lawful guardian of the minor. 53 M.L.J. 677, overruled and endorsements of payments by the paternal grandmother cannot bind the minor and save limitation.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

K. Srinivasa Rao for Respondent.

K. S,

The Chief Justice and Krishnaswami Aiyangar, JJ.
3rd October, 1939.

S. A. No. 23 of 1936.

Madras Estates Land Act (I of 1908), S. 117—Provision whether obligatory or directory—Test—Disregard of provisions as to sale—Effect—Absence of injury as result of irregularity—Effect.

Whether the terms of a statute are to be regarded as imperative or directory only turns upon a correct application of the scope of the Act itself and is not to be controlled by the consideration whether substantial injury has or has not resulted.

Where the selling officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed, disregarded the provisions of the statute and he did not pass a single order and the orders which the selling officer should have passed were passed by the Collector who had no authority it is not a mere irregularity and the sale cannot be regarded as a sale lawfully held under the Act. There is no provision in the Estates Land Act which is similar to O. 21, r. 90, Civil Procedure Code, which says that a sale shall not be set aside as the result of irregularity or fraud unless the applicant has sustained substantial injury as the result.

40 L.W. 535, referred to.

N. S. Rangaswami Aiyangar for Appellants.

K. Venkateswaran for Respondents.

K. S,

[F. B.]

The Chief Justice, Pandrang Row, Abdur Rahman, Krishnaswami Aiyangar and Patanjali Sastri, JJ.
6th October, 1939.

C. R. P. No. 267 of 1936.

Court-Fees Act (VII of 1870); Art. 17-B of Sch. II and S. 7 (iv) (b)—*Suit for partition under Hindu Law impugning debts and alienations—Proper court-fee.*

In a suit for partition by a member of a joint Hindu family the only provision in the Court-Fees Act which is applicable is Art. 17-B of Sch. II and not S. 7 (*iv*) (*b*).

21 M.L.J. 21 (majority view), overruled.

Case-law discussed.

Where in the suit the plaintiff is asking for possession of his share in the estate to be calculated after certain transactions have been set aside it is necessary for the plaintiff to stamp his relief in accordance with the provisions of S. 7 (*v*). In respect of decrees passed against the plaintiff in suits in which he had been ***eo nomine*** impleaded as a party it is plain he must pay the fee prescribed by S. 7 (*iv*) (*a*); where the plaintiff impleads several creditors asking for a declaration in respect of each of the transactions impugned and he was not ***eo nomine*** a party to them he cannot be called upon to pay any additional fee.

V. V. Srinivasa Aiyangar for *S. Ramanujachariar* and *V. R. Venugopalan* for Petitioners.

The Government Pleader (B. Sitarama Rao), T. S. Venkatarama Aiyar, K.R. Rangaswami Aiyangar, R. Rajagopala Aiyangar, S. Venkatesan and *R. Viswanathan* for Respondent.

K. S.

Wadsworth, J.
13th October, 1939.

S. A. No. 673 of 1936.

Hindu Law—Marriage with girl, not a virgin—Validity.

According to ordinary practice Hindus of the higher caste married virgins, but if a Hindu chose to marry a girl who was not a virgin or whom he knew not to be a virgin, he could not use that fact as a ground for treating the marriage null and void.

P. Govinda Menon for Appellant.

S. Venkatachala Sastri for Respondent.

K. S.

The Chief Justice and O. S. A. No. 30 of 1938.
Kunhi Raman, J.
4th September, 1939.

Equitable mortgage—Title deeds handed over 4 or 5 days before advance of loan—Letter of collateral security on date of loan evidencing deposit—When inadmissible for want of registration.

A memorandum of equitable mortgage by deposit of title deeds, (title deeds having been handed over previously to mortgagee for inspection and retained by him as security for loan advanced later); stated:—"On executing a pronote to you this date, Rs. 1,900 has been received in cash from you. For this sum I have kept with you as security house . . . Madras, and the original title deeds relating to the property. At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds. To this effect have I executed this collateral letter with consent."

Held, the memorandum constituted the bargain between the parties and operated to declare the rights of the mortgagees in the property. It falls within S. 17 of the Registration Act and not having been registered cannot be admitted in evidence.

N. K. Mohanarangam Pillai for Appellant.

K. Narasimha Aiyar, T. V. Subramania Aiyar, Official Assignee of Madras, Srinivasa Raghavan and *Thiyagarajan* for Respondents.

K. S.

Kunhi Raman, J. C. R. P. No. 968 of 1938.
21st September, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Decree against assets of the husband in the hands of the widow—Application by the widow to scale down the debts—Competency of.

Where a widow applied under S. 19 of the Madras Agriculturists Relief Act for scaling down of the decree which was passed against the assets of the deceased husband in her hands, on objection that inasmuch as there was no personal decree against her she was not a judgment-debtor entitled to apply under the Act,

Held, she was a judgment-debtor within the meaning of the section and as such entitled to apply.

(1938) 2 M. L. J. 1068, relied on.

A. Lakshmayya for Petitioner.

K. Venkateswaran for *V. V. Chowdhury* for Respondent.

K. C.

N. R. C.

Wadsworth, J. A. A. O. No. 199 of 1938.
22nd September, 1939.

Madras Estates Land Act (I of 1908), S. 151 (2) (as amended)—Suit for injunction against trespasser—If lies in Revenue Court.

The only type of injunction which the Revenue Court is empowered to grant under the Estates Land Act is that specified in S. 151 (2), that is, an injunction restraining an occupancy ryot from impairing the agricultural value of the land. The section has no application to a suit for injunction against an alleged trespasser.

T. S. Narasinga Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

K. S.

Wadsworth, J. S. A. No. 70 of 1936.
28th September, 1939.

Transfer of Property Act (IV of 1882), S. 119 (as before the amendment)—Exchange of land—Part of the land subject to mortgage—Dispossession by purchaser in sale in execution of mortgage decree—Claim for return of original property from the other party.

Where a part of the properties given to the plaintiff in exchange (before amendment of Transfer of Property Act) were subject to a prior mortgage and in the sale in execution of the decree on the mortgage a third person who purchased the property dispossessed the plaintiff (after amendment) the plaintiff claimed the return of the property given by him expressing willingness to surrender the balance of the properties in his possession.

Held, the transferee from the defendant was bound to give back the land to the plaintiff if the property given in exchange was lost to the plaintiff.

I. L. R. 42 Mad. 690, followed.

I. L. R. 46 All. 359, A. I. R. 1934 Lah. 934 and A. I. R. 1934 Nag. 610, not approved.

The contract of exchange must be deemed to have as an implied term the provision of law governing the contract at that time and the plaintiff must be deemed to have acquired a right to work out his remedy of restoration as against the transferor and those claiming under him in the contingency of his being dispossessed at some future date. Transfer of Property Act, S. 119 (before the amendment) will govern the case.

V. Ramaswami Aiyar and *R. Sundaralingam* for Appellant.

V. V. Ramadurai for Respondent.

K. S.

Wadsworth, J. S. A. No. 207 of 1936.
29th September, 1939.

Madras Survey and Boundaries Act (VIII of 1923), S. 14—Suit by ryot—If precluded by prior decision between adjacent landlords.

Where the dispute regarding boundary has been determined only on a contest between the proprietors of the two adjacent villages, the ryots have a right to reopen the matter by means of a suit prescribed under S. 14.

K. Rajah Aiyar and *R. Krishnaswami Aiyangar* for Appellant.

V. Ramaswami Aiyar for Respondents.

K. S.

Wadsworth, J. S. A. No. 344 of 1936.
3rd October, 1939.

Madras Survey and Boundaries Act (VIII of 1923), S. 13—Notification in respect of Boundary laid before Act—Effect.

In a suit to establish plaintiffs, right to a piece of land in the possession of her neighbour the defendant, objection was taken that the matter was concluded by the demarcation of the boundary under the Madras Survey and Boundaries Act of 1923 which was notified on 28th February, 1929,

Held, the final notification under S. 13 of the Act of 1923 would be valid and would bring into operation that limitation provisions of S. 14 and the plaintiff not having filed the suit within 3 years to dispute the correctness of the boundary so laid down is barred from bringing her suit thereafter.

K. Bhimasankaram for Appellant.

Ch. Raghava Rao for Respondent.

K. S.

Wadsworth, J. S. A. No. 915 of 1935.
10th October, 1939.

Civil Procedure Code (V of 1908), S. 92 and O. 1, r. 8—Suit against trustees by some members of community for declaration that property is trust property and for injunction restraining trustees from treating it otherwise—If suit falls within S. 92, Civil Procedure Code—Failure to adopt procedure under O. 1, r. 8—Effect.

Where all that the plaintffs seek is a declaration that the suit property is trust property and for the consequential injunction to prevent the trustees from treating it otherwise, the suit cannot be said to fall within S. 92 of the Civil Procedure Code.

Where the plaintiffs seek to assert no personal or individual rights which they share with others and they are seeking to assert for the community as a whole rights enjoyed jointly by that community, the proper procedure is laid down in O. 1, r. 8, Civil Procedure Code. If the plaintiffs in spite of objection taken took the risk of refusing to adopt that procedure they cannot complain, if the Court rejects the suit for failure to implead all those on whose behalf the relief is sought. The fact that one plaintiff is the son of a deceased trustee gives him no special rights in the absence of evidence that the trusteeship is hereditary. The fact that some of the other plaintiffs were amongst the members of the community who established the trust will not put them in any better position than those others who may be numerous who shared in the foundation.

K. V. Sesha Aiyangar for Appellants.

J. Subbuswami for Respondents.

K. S.

Wadsworth, J. S. A. No. 612 of 1936.

11th October, 1939.

Estoppel—Mortgagee orally representing that he has released property from mortgage—Purchase on faith of representation—Mortgagee estopped from saying release inadmissible for lack of registration.

Where a purchaser who is a stranger to the mortgage seeks to prove that there was a representation made by the mortgagee to the effect that the properties had been released and that by virtue of that representation he was induced to take the sale, the person who made the representation is barred from enforcing the mortgage which he represented to have been rescinded, the estoppel does not depend upon the fact or validity of the release and the case is not one of estoppel against the statute. The estoppel against the mortgagee is valid.

K. Rajah Aiyar and *K. Subramaniam* for Appellant.

T. K. Sundararaman for Respondent.

K. S.

Wadsworth, J. S. A. No. 1041 of 1937.

11th October, 1939.

Madras Estates Land Act (I of 1908), S. 112—Sale under—Person interested in land but not registered pattadar—Right to bring suit in Civil Court to declare sale invalid.

There is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land

which is adversely affected by a sale (under S. 112 of the Madras Estates Land Act) from challenging that sale in the ordinary Civil Courts and protecting his interest.

23 L.W. 149, relied on.

T. R. Venkatarama Sastri, K. Rajah Aiyar and *K. Muthuswami Aiyar* for Appellants.

V. Ramaswami Aiyar and *K. S. Ramamurthi* for Respondent.

K. S.

Mockett, J. C. R. P. No. 44 of 1939.
13th October, 1939.

Civil Procedure Code (V of 1908), S. 151—Suit and decree on first mortgage only when there were other mortgages in favour of plaintiff—Contravention of Transfer of Property Act, S. 67-A —Decree if can be set aside and suit if can be resuscitated and remodelled under S. 151, Civil Procedure Code.

A bank filed a suit against a mortgagor on the first mortgage only and obtained a decree in ignorance of the introduction of S. 67-A by the amendment of Transfer of Property Act. In an application under S. 151 of the Civil Procedure Code to set aside the decree and amend the suit in the ends of justice,

Held, S. 151, Civil Procedure Code, cannot be used for the purpose of setting aside a decree and resuscitating and remodelling a suit because those advising the parties had been unaware of the law.

T. K. Subramania Pillai for Petitioner.

V. Rajagopalachari and *S. A. P. Alvaras* for Respondent.

K. S.

Burn and Stodart, JJ. A. A. O. Nos. 100 and 101 of 1939.
13th October, 1939.

Companies—Liquidation—Court giving permission to liquidator to sell properties and sanctioning a contract of sale and compromise of two suits in another Court—If sanction can be revoked.

In liquidation proceedings the District Court gave the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and also expressly sanctioned the contract of sale entered into by the Official Liquidator, for a sum considerably in excess of the stipulated price. The Court further sanctioned the compromise of two suits in another Court between the purchaser and the company. The creditor on whose petition the winding up was ordered applied for the revocation of these orders and the District Judge granted the application.

Held, the District Judge had no power to revoke the sanction he had given for the sale of the properties and compromise of the suits.

24 L.W. 35, distinguished and on the merits also held the sanction ought not to have been revoked.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *D. R. Krishna Rao* for Appellant.

K. Rajah Aiyar and *K. Kameswra Rao* for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1427 of 1936.
16th October, 1939.

Small Cause Courts—Judgments—Necessity for setting out the points for determination and the decision arrived at.

Although a judgment of a Court of Small Causes may be summary (according to O. 20, r. 4 and O. 18, r. 13, Civil Procedure Code) still the statute insists upon the points for determination to be set forth and the decision arrived at thereon recorded. If a judgment falls short of even this minimum requirement it is no judgment at all.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Wadsworth, J. S. A. No. 700 of 1936.
18th October, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 100, 103—Previous claim proceedings ending by abandonment by the claimant during investigation—Court ordering 'not pressed dismissed no costs'—If such an order would bar a suit filed to establish title.

Plaintiff on a former occasion intervened in delivery proceedings in a suit in the sub-Court and claimed redelivery under O. 21, r. 100, Civil Procedure Code. The application went on and some evidence taken for the claimant. Ultimately the claimant prayed for dismissal of the claim proceedings stating that the petition was not pressed and should be dismissed without costs. The Court dismissed it without costs. This was during the investigation of the claim. Within one year, plaintiff filed a regular suit in the District Munsiff's Court to set aside the order in the claim proceedings and to declare his title and give him possession. The suit was decreed, and on appeal the sub-judge held that the order in the claim proceedings was a consent adverse order and no suit would lie on the regular side to set aside a consent order and dismissed the suit.

Held, that a suit like this was not barred. Case-law considered. Scope of a suit under r. 103 discussed.

A.I.R. 1925 Mad. 265, 110 I.C. 511 and A.I.R. 1935 Mad. 544, referred to.

K. G. Srinivasa Aiyar for Appellant.

M. S. Vythianatha Aiyar for *A. V. Narayanaswami Aiyar* for Respondent.

K. C.

Horwill, J. C. R. P. No. 1180 of 1939.

19th October, 1939.

Fatal Accidents Act (XIII of 1855), S. 3—Frame of plaint for compensation by dependants.

Any suit under Fatal Accidents Act must be in a representative character on behalf of the persons dependant on the deceased. But it is not necessary that every person who may claim some right to compensation should be made a party to the plaint. It suffices if one person brings the suit provided that he or she states in the plaint the names of the persons on whose behalf the suit is brought.

V. T. Rangaswami Aiyangar for Petitioner.

S. Balasingam Satya Nadar and *N. C. Rangaswami* for Respondent.

K. S.

Horwill, J. C. R. P. No. 1069 of 1937.

19th October, 1939.

Madras Estates Land Act (amending Act XVIII of 1936)—Suit in Court having jurisdiction before the Act—Jurisdiction if lost by reason of the Act.

In a suit for rent in the Civil Court issues were framed and on a Civil Revision Petition which was allowed it was remanded for fresh disposal. The defendants then took the objection in an additional written statement that the Court had no jurisdiction by virtue of Act XVIII of 1936 under which the Court having jurisdiction would be a Revenue Court.

Held, the Civil Court ceased to have jurisdiction after the pssing of the Act and when it was brought to the notice of the Court it was bound to stop the case and return the plaint.

(1938) 1 M.L.J. 206 and (1937) 2 M.L.J. 573, followed.

C. Rama Rao for Petitioner.

K. Bhimasankaram for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 466 of 1939.
20th October, 1939. Crl. R. P. No. 433 of 1939.

Cattle Trespass Act (I of 1871), S. 20—Complaint under Act made out of time—If to be considered to have been made on previ-

ous day because it was a holiday—General Clauses Act, S. 10—If applicable.

Where the seizure of the cattle was on 15th September, 1938 and the complaint under Cattle Trespass Act (I of 1871), S. 20 was made on 26th September, 1938,

Held, S. 10 of the General Clauses Act, 1897, is not applicable to Acts passed before 1887 and the complaint cannot be considered to have been made on 25th September, 1938, because it was a holiday. The complaint was therefore out of time and it will stand dismissed against all the accused.

V. Rangachari for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K.S.

Patanjali Sastri, J. S. A. No. 232 of 1936.
3rd November, 1939.

Transfer of Property Act (IV of 1882), S. 108 (g)—Sub-lease of remainder of term of lease—If an assignment of lease or a sub-lease—Payment by sub-lessee of a charge-holder—If entitled to deduction—Agricultural lease—If Transfer of Property Act applicable.

A lessee *R* sued *N* his sub-lessee for arrears of rent due on the basis of the sub-lease granted by him.

N claimed deduction of the amount paid by him to a maintenance charge-holder whose amounts had fallen into arrears.

He also pleaded that the sub-lease being of the entire residue of the term the sub-lease was in the nature of an assignment of lease.

(*a*) *Held*, that the principle of English law regarding sub-lease of the residue of the term would not apply to India.

I.L.R. 57 Cal. 1176 (P.C.), followed;

(*b*) that under the covenant for quiet enjoyment the lessee was liable to see that the charge was paid and hence under S. 108 (*g*) of the Transfer of Property Act the sub-lessee would be entitled to the deduction claimed.

40 L.W. 545, followed.

(*c*) that though the Transfer of Property Act cannot in terms apply to agricultural leases its principle was applicable to the case.

I.L.R. 42 Mad. 654, followed.

T. E. Ramabhadrachariar for Appellant.

M. Murugappa Chettiar for Respondent.

S.V.V.

Wadsworth, J., on difference of opinion between Burn and Stodart, JJ.
15th September, 1939.

A. A. O. No. 275 of 1936.

Civil Procedure Code (V of 1908), S. 144—Reversal of decree for possession of immovable property—Amounts drawn by party in possession—Remedy of appellant by way of restitution—Proper procedure.

Plaintiff sued to recover an estate as the son of the last holder of the estate. Suit was decreed by the Subordinate Judge. But plaintiff's claim for mesne profits both before and after suit till the date of delivery was disallowed. Both plaintiff and defendant appealed to the High Court. Pending disposal of appeal a receiver was appointed and he took possession. The High Court allowed the defendant's appeal and dismissed the suit. Pending an appeal to Privy Council the defendant was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council was successful and judgment of the Subordinate Judge was restored and defendant was ordered to pay costs of the plaintiff both in the High Court and the Privy Council.

Plaintiff executed the decree restored by the Order in Council and got possession of the estate. Then the plaintiff put in a petition for restitution and impleaded the defendant's widow and legal representatives and also the sureties who had executed the security bonds in the High Court and claimed (1) the restoration of amounts drawn as allowances by the widow, (2) restoration of amounts wrongly appropriated by the defendants, (3) return of records and accounts from the receiver to the plaintiff, and (4) that the sureties might be ordered to pay the plaintiff the sums covered by their security bonds.

The appeal came on before *Burn* and *Stodart, JJ.*, and prayers 1 and 3 were not pressed. *Burn, J.*, was of opinion that in proceedings under S. 144 no order for restitution can be made against sureties, though there is no objection to their being made parties in such proceedings.

As to restoration of amounts drawn and for mesne profits *Burn, J.*, was of the opinion that the proper remedy lay in a suit for accounts and not in an application by way of restitution. *Stodart, J.*, however was of opinion that the plaintiff could recover

under S. 144, Civil Procedure Code, the sums which the defendant received as profits of the estate during the time she was in possession under the decree which has been reversed.

Owing to the difference of opinion on the question of applicability of S. 144, Civil Procedure Code, and the liability of defendant to make restitution the case was laid before *Wadsworth, J.*, who held agreeing with *Stodart, J.*, that S. 144, Civil Procedure Code, was applicable and the case is covered by the decision in I. L.R. 7 Pat. 319, and that the plaintiff is entitled to claim restitution of any profits realised by the defendant's legal representative which can be called properly consequential upon the wrong decree, unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court.

As to the extent of the liability of the defendant's legal representatives, *held*, that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The correct procedure is to award the successful party restitution in the shape of any profits wrongly received under the erroneous decree or as a direct consequence thereof. There is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court.

No relief was granted against the sureties.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

K.S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1292 of 1936.
11th October, 1939.

Provincial Small Cause Courts Act (IX of 1887), Art. 31 of Sch. II—Suit by agent for recovery of balance due from principal —If suit for accounts—Jurisdiction of Small Cause Courts.

The agent of a *stanam* sued his principal for a balance of Rs. 189-9-9 as due to him. His case was that after taking into accounts what he had collected by way of rent and what he had expended and the salary due to him the defendant was liable for the

Wadsworth, J. A. A. O. No. 275 of 1936.
15th September, 1939.

Civil Procedure Code (V of 1908), S. 144—Reversal of decree for possession of immovable property—Amounts drawn by party in possession—Remedy of appellant—If by restitution or suit for accounts.

Plaintiff sued to recover an estate as the son of the last holder of the estate. Suit was decreed by Subordinate Judge. But plaintiff's claim for mesne profits both before and after suit till the date of delivery was disallowed. Both plaintiff and defendant appealed to the High Court. Pending disposal of appeal a receiver was appointed and he took possession. The High Court allowed the defendant's appeal and dismissed the suit. Pending an appeal to Privy Council the defendant was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council was successful and judgment of the Subordinate Judge was restored and defendant was ordered to pay costs of the plaintiff both in the High Court and the Privy Council.

Plaintiff executed the decree restored by the Order in Council and got possession of the estate. Then the plaintiff put in a petition for restitution and impleaded the defendant's widow and legal representatives and also the sureties who had executed the security bonds in the High Court and claimed restoration of amounts drawn as allowances by the respondent.

Held, that the remedy of the plaintiff lay in a suit for accounts and mesne profits and not in an application by way of restitution.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

K. S.

Wadsworth, J. S. A. Nos. 995 and 996 of 1932 and
25th September, 1939. C. M. Ps. Nos. 595 and 597 of 1939.

Transfer of Property Act (IV of 1882), S. 84—Case governed by act before amendment—Withdrawal of amount deposited by mortgagor—Liability for interest after withdrawal.

In a mortgage governed by the Act before amendment, there was a deposit, a refusal to accept that deposit, a withdrawal by the plaintiffs and attachment of part of this sum withdrawn by the creditors of the mortgagor plaintiffs. The mere fact that the plaintiffs withdrew the deposit when the mortgagees refused to accept it, will not raise a presumption that the plaintiffs ceased to be ready and willing to pay the amount due on the mortgage. In such circumstances interest ceases to run with reference to the terms of S. 84 of the Transfer of Property Act.

N. R. C.

V. Ramadoss and *K. Subba Rao* for Appellants.

Ch. Raghava Rao, S. Ramamoorthy and *K. Someswara Rao* for Respondents.

K. S. ———

Wadsworth, J. A. A. O. No. 349 of 1936.
2nd October, 1939.

Hindu Law—Maintenance—Permanently kept concubine though childless—If entitled to maintenance.

A permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless.

Spencer, J.'s *obiter dictum* in I.L.R. 48 Mad. 805, not followed.

10 B.H.C.R. 381, discussed.

I. L. R. 50 Bom. 604, referred.

K. Kameswara Rao and *B. S. Ramachandrudu* for Appellant.

P. Somasundaram for Respondent.

K. S. ———

Patanjali Sastri, J. S. A. No. 605 of 1936.
10th October, 1939.

Madras Estates Land Act (I of 1908), S. 125—Mortgage executed after passing of Act to pay off mortgage created before the Act—If mortgage created before Act by reason of right of subrogation.

It will be stretching the language of S. 125 far too much to hold that by reason of a right of subrogation arising out of it a mortgage should be deemed to be an encumbrance created before the passing of the Act, although in fact it was executed subsequent to the Act.

46 M.L.J. 380, applied.

Ch. Raghava Rao for Appellant.

K. Krishnamurthi for Respondent.

K. S. ———

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1292 of 1936.
11th October, 1939.

Provincial Small Cause Courts Act (IX of 1887), Art. 31 of Sch. II—Suit by agent for recovery of balance due from principal—If suit for accounts—Jurisdiction of Small Cause Courts.

The agent of a *stanam* sued his principal for a balance of Rs. 189-9-9 as due to him. His case was that after taking into accounts what he had collected by way of rent and what he had expended and the salary due to him the defendant was liable for the

amount. Defendant objected to the jurisdiction of the Small Cause Court on the ground that it was a suit for an account within the meaning of Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act, 1887.

Held, it was not a suit for an account and the District Munsif had jurisdiction.

I.L.R. 28 Mad. 394, 24 M.L.J. 693 and (1938) 2 M.L.J. 112, relied on.

(1938) 2 M.L.J. 76, disapproved.

P. Govinda Menon for Petitioner.

D. A. Krishna Variar for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 696 of 1935.
13th October, 1939.

Partnership—Adjudication of all the partners insolvents—If dissolves partnership—Subsequent annulment—If revives the partnership—Borrowing by one partner after dissolution—How far binding on others.

When all the partners are adjudged insolvents the partnership must be deemed to have been dissolved and the managing partner had no authority to pledge the credit of other partners by executing promissory notes in the firm name so as to make them personally liable even though the borrowing was for the purpose of discharging a binding partnership debt. The annulment of the adjudication could not in law have the effect of reviving the partnership.

C. K. Viswanatha Aiyar for Appellants.

O. T. G. Nambiar and *A. Achuthan Nambiar* for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1334 of 1936.
16th October, 1939.

Provincial Insolvency Act (V of 1920), S. 53—Sale set aside —Question as to payment of items of consideration—How determined.

When once the sale is set aside under S. 53 of the Act the question as to whether the alienee has or has not paid the items of consideration which he claims to have paid has to be determined independently of the validity of the alienation itself.

P. C. Parthasarathi Aiyangar, N. Ramaswami Aiyangar and *S. V. Venugopalachari* for Petitioner.

K. R. Vepa for Respondent.

K. S.

Horwill, J. C. R. P. No. 1570 of 1936.
17th October, 1939.

Madras Land Revenue Assessment Act (I of 1908)—Suit for contribution for peishcush *paid after the portion of estate has passed into other hands—Suit if lies in Civil Court.*

Though the Act deprives the parties from recourse to Civil Courts with regard to the amount fixed for *peishcush* there is nothing in this Act or Rent Recovery Act which prevents a party coming to a Civil Court for contribution for *peishcush* paid after a portion of the estate has passed into other hands. S. 41 of the Small Cause Courts Act is no bar to the suit either.

K. Raja Aiyar and *S. Rajagopalachari* for Petitioner.
K.S. Ramabhadra Aiyar for Respondent.
K. S.

Horwill, J. C. R. P. No. 1592 of 1938.
17th October, 1939.

Practice—Question as to court-fee—Decision by Court on admission of plaint—Defendant again raising question as to court-fee—If Court precluded from reconsidering the decision.

Where the Court has already decided the question of court-fee, the Court is precluded from reconsidering the matter on a preliminary issue raised by the defendant later.

69 M.L.J. 479 and I.L.R. 1937 Mad. 325, relied on.

The only reason why a Court should consider the valuation of a suit are (1) for the purpose of ascertaining the proper court-fee and (2) to determine whether it has jurisdiction to try the suit.

K. G. Srinivasa Aiyar for Petitioner.
T. V. Ramanatha Aiyar for Respondent.
K. S.

Patanjali Sastri, J. S. A. No. 550 of 1936.
17th October, 1939.

Transfer of Property Act (IV of 1882), Ss. 76 and 77—Usufructuary mortgage of kushikanom rights—Mortgagee not paying rents—Decree for rent unenforceable by lapse of time—Unpaid rent—How to be adjusted.

There was a usufructuary mortgage of kuzhikanom rights. The mortgage provided that out of the rents and profits the rent payable to the *jenmi* should be paid every year and the balance should be appropriated in lieu of interest on the principal. The rent fell into arrears and the *jenmi* obtained a decree for possession with rents due. The decree was not executed and became unenforceable owing to lapse of time. In a suit by the successor in interest of the mortgagor,

Held, that the mortgagor is entitled to claim an adjustment of the unpaid rents due to the *jenmi* against the mortgage amount.

57 M.L.J. 800, relied on.

Case-law discussed.

C. S. Krishnamurthi Aiyar for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

K. S.

Mockett, J. C. R. P. No. 246 of 1938.
20th October, 1939.

Civil Procedure Code (V of 1908) O. 21, r. 90 (proviso)—Power to call upon applicant ta furnish security—When to be exercised.

The woid "Admission" conveys that point of time when an application or suit as the case may be is received into Court and accepted for decision and that stage is when notice is given to the opposite side.

The Court is responsible for executing its decrees and the framers of the proviso had in mind the discretion in the Court to pass such orders as it thinks fit for the protection of the decree-holder but the wording of the proviso specifically excluded the right of a decree-holder to apply to the Court for such orders. The power of the Court to call upon the applicant to furnish security is confined to the time anterior to admitting the application to set aside the sale.

A.I.R. 1939 Pat. 248 (F.B.), referred to.

P. Somasundaram for Petitioner.

V. Govindarajachari for Respondent.

K. S.

The Chief Justice and S. A. No. 23 of 1936.
Krishnaswami Aiyangar, J.
20th October, 1939.

Madras Estates Land Act (I of 1908), Ss. 112, 116 and 117 and O. 21, r. 90, Civil Procedure Code—Sub-Collector drawing up proclamation of sale and causing it to be affixed—Appointment of selling officer and himself fixing date of sale—Irregularity or illegality—'Shall appoint'—Mandatory or directory—Sale illegal and void.

Where under the provisions of the Estates Land Act the Sub-Collector was required to appoint a selling officer for selling a holding for arrears of rent, whose duty it was to draw up the proclamation of sale, affix it and fix a date of sale, the Sub-Collector himself drew up the proclamation of sale, had it affixed by a

process-server but later appointed a selling officer and himself fixed the date of sale.

Held, that there had not been compliance with the mandatory provisions of the Act and as such the sale was null and void. The sale was not an irregularity but an illegality and that the acts of the Sub-Collector were without jurisdiction and that injury would result if the sale were allowed to stand.

(1877) L.R. 2 P.D. 203, referred to.

30 L.J.Ch. 379 at 380; Observations in Maxwell's Interpretation of Statutes (8th Edition), p. 321 and 40 L.W. 535, relied on.

B. Sitarama Rao for *N. S. Rangaswami Aiyangar* for Appellants.

Ch. Raghava Rao and *K. Venkateswaran* for Respondent.

K. C.

Horwill, J.
20th October, 1939.

C. R. P. No. 605 of 1938.

Practice—Plaintiff poor woman—Security for costs against—Discretion to order.

It would be most unjust if a poor woman were prevented from pursuing her suit (by being ordered to furnish security for costs of defendant) merely because she happened to be in indigent circumstances.

I.L.R. 21 Cal. 832, relied on.

V. Ramaswami Aiyar and *C. Somasundaram Chettiar* for Petitioner.

T. A. Ramaswami Reddy for Respondent.

K. S.

Horwill, J.
24th October, 1939.

C. R. P. No. 88 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Property sold in execution and satisfaction entered—Delivery of property to purchaser—If can be stayed.

Merely because full satisfaction has been entered it does not mean that execution is at an end. If the property purchased by the decree-holder has not been delivered to him then execution is not at an end and S. 20 of Act IV of 1938 can therefore be applied to stay a delivery of possession.

K. Ramamurthi and *K. Someswara Rao* for Petitioner.

T. Satyanarayana for Respondent.

K. S.

Stodart, J. C. R. P. No. 963 of 1939.
24th October, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (Explanation)—Renewal of mortgage in favour of different persons successively—If last of such mortgagee "same creditor."

There were three successive mortgages each in renewal of the one before. The mortgagees were in each case different, namely, the petitioner's mother, the petitioner's uncle and finally the petitioner to whom the money lent belonged.

Held, the interpretation of the expression "same creditor" to include cases like this is not unreasonable.

T. K. Sundararaman for Petitioner.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. S. A. No. 125 of 1936.
24th October, 1939.

Mortgage — Construction — Clause "You will receive the principal amount whether demanded by you or paid by us"—If a personal covenant to pay.

In a mortgage the words "you will receive the principal amount whether demanded by you or paid by us" clearly amounts to a covenant to pay.

S. Rangachari for Appellant.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Respondents.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. M. P. No. 2235 of 1939.
25th October, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 10—Allowing creditor time for filing statement of claim—Power of Board.

The Board gave time to a creditor to file his statement of claim required by S. 10.

Held, in view of proviso to S. 10 the Board has power to extend the time for filing a statement of claim.

Ch. Raghava Rao for *S. Sitarama Aiyar* and *S. Rajarama Aiyar* for Petitioners.

A. V. Viswanatha Sastri for 1st Respondent.

K. S.

Lakshmana Rao, J. Crl. App. No. 382 of 1939.
26th October, 1939.

Criminal Proced..re Code (V of 1898), S. 380—Magistrate to whom proceedings submitted—If can set aside under S. 380 conviction recorded by referring Magistrate.

It is not open to the Magistrate to whom proceedings are submitted under S. 380, Code of Criminal Procedure to set aside under that section the conviction recorded by the referring Magistrate.

I.L.R. 57 Mad. 85, followed.

G. Balaparameswari Rao for Accused.

The Public Prosecutor (V. L. Ethiraj) for Appellant.

K. S.

Lakshmana Rao, J. Cr. R. C. No. 879 of 1939.
26th October, 1939. Cr. R. P. No. 827 of 1939.

Indian Penal Code (XLV of 1860), S. 175—Failure of defendant in civil suit to produce certain records—Complaint under Criminal Procedure Code, S. 482—Competency.

After refusal by Court to sanction a complaint under S. 476 a complaint under S. 482, Criminal Procedure Code, was filed for failure by a defendant in a civil suit to produce certain documents.

Held, an offence under S. 175, Indian Penal Code, cannot be said to have been committed in the view or presence of the District Court and the complaint was not competent.

I.L.R. 13 Mad. 24, referred.

D. A. Krishna Variar and *M. C. Sridharan* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Kunhi Raman, J. C. R. P. No. 1212 of 1939.
27th October, 1939.

Civil Procedure Code (V of 1908), O. 37—Leave to defend—When conditions can be imposed.

In an order granting leave to defend, if the order was not made by consent it is necessary that the Court should apply its mind to the facts disclosed in the affidavits filed before it and arrive at the conclusion that unconditional leave should not be granted to defend the action.

A. Lakshmayya for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ. App. No. 301 of 1936.
2nd October, 1939.

Limitation Act (IX of 1908), S. 7—Hindu Law—Eldest brother manager of joint family—Capacity to give discharge—Effect on minor brothers right to sue—Presumption as to capacity to give discharge.

When there is an eldest member of a family the presumption is that under the Hindu Law he is the manager of the family. If he is the manager, under S. 7 of the Limitation Act, discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned.

Case-law referred to.

If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge it is incumbent on that person to prove the facts rebutting the said presumption.

I.L.R. 31 All. 156, not approved.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

P. Somasundaram for Respondent.

K. S.

Wadsworth, J. S. A. No. 50 of 1936.
5th October, 1939.

Transfer of Property Act (IV of 1882), S. 3, Expl. 1—Oil engine installed as part of a cinema—Security bond relating to—If a transaction relating to immovable property.

The mere fact that the property in question was firmly but not permanently attached to the premises and also the fact that the registration department for its own purposes requires such a transaction to be treated as a transaction relating to immovable property will not affect the true nature of the transaction which was one regarding a chattel.

So a security bond pledging an oil engine installed as part of a cinema is not one relating to immovable property and explanation 1 to S. 3 of the Transfer of Property Act does not apply.

T. K. Sundararaman for Appellant.

N. R. Govindachari for Respondent.

K. S.

Pandrang Row and Venkataramana Rao, JJ. O. S. A. Nos. 68 and 82 of 1937.
16th October, 1939.

Presidency Towns Insolvency Act (III of 1909), S. 46—Father's debts—If provable in son's insolvency—Creditors in respect of father's debts if entitled to priority.

The father's debt is provable in the insolvency of the son under S. 46 of the Presidency Towns Insolvency Act. Neither during the father's lifetime nor after his death the son's interest in the joint family property can be said to be charged for the father's debt. If a father's creditor chooses to prove in the insolvency of the son as a provable debt of the son he must submit himself to the provisions of the Insolvency Act which does not recognise any priority in his favour.

N. T. Shamanna for Appellant in O. S. A. No. 68 of 1937 and Respondent in O. S. A. No. 82 of 1937.

T. V. Ramiah for Respondent in O. S. A. No. 68 of 1937 and Appellant in O. S. A. No. 82 of 1937.

K. S.

Venkataramana Rao and Appeal No. 295 of 1936.
Kunhi Raman, JJ.
16th October, 1939.

Hindu Law—Widow—Maintenance—Decree for, against joint family—Subsequent partition—If a charge in circumstances necessitating a modification of the decree.

If when a member of an undivided family dies leaving him surviving his widow and his sons and brothers her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, that is, instead of a right over those persons who take her husband's share. But if before partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among members of the family.

Case-law discussed.

(1939) 2 M.L.J. 340 (F. B.), referred to and explained.

Where a widow has secured a charge on certain properties the charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. Partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosesoever's hands the properties may be.

V. S. Narasimhachari for Appellant.

D. R. Krishna Rao and *K. Umamaheswaram* for Respondents.

K. S.

The Chief Justice and S. A. No. 617 of 1938.
Krishnaswami Aiyangar, J.
24th October, 1939.

Landlord and tenant—Tenant taking water for second crop—Liability to pay for it—Payment by tenant of water cess to Government—Effect.

Where a tenant takes water for the second crop from the estate tank the *solum* of which is vested in the landholder, the tenant must pay for it. The fact that the Government water flowed into the landholder's tank did not mean that when the water got there it remained Government water. It mingled with the landlord's water and must be deemed to be his. The right of Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government. Payment of water cess by tenant to Government does not affect the liability to pay for the water to the landholder.

P. N. Marthandam Pillai and *C. Rangaswami Aiyangar* for Appellant.

K. Swaminatha Aiyar for Respondent.

K. S.

The Chief Justice and C. R. P. No. 873 of 1939.
Krishnaswami Aiyangar, J.
25th October, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 9—Holder in due course—Right against maker—Repayment by maker to original payee—Effect.

Respondent executed a pronote in favour of the second defendant. Respondent alleged that she repaid the amount two days later. But the payee indorsed the note in favour of the petitioner. The petitioner instituted a suit on the promissory note.

Held, the petitioner is entitled to sue and obtain a decree against the maker of the note.

J. Krishnamurthi for Petitioner.

K. Venkatarama Raju for Respondent.

K. S.

Horwill, J. S. A. No. 681 of 1936.
26th October, 1939.

Civil Procedure Code (V of 1908), S. 149—Presentation of appeal with deficit court-fees within time—Payment of deficit later within time allowed for it—Retrospective effect to make presentation valid.

S. 149, Civil Procedure Code, permits the Court to allow the appellant time to pay the deficit court-fee. The payment of the deficit court-fee within the time allowed has retrospective effect and is deemed to have been made at the time of the presentation.

P. Somasundaram for Appellants.

P. V. Vallabhacharyulu and *M. S. Ramachandra Rao* for Respondents.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 899 of 1939.
27th October, 1939. Crl. R. P. No. 847 of 1939.

Criminal law—Practice—Joint Magistrate sanctioning prosecution—If can hear the appeal in that case—Procedure.

Where the prosecution of the petitioner was sanctioned by the Joint Magistrate, the appeal in the case should not be heard by the Joint Magistrate except with the permission of the Court to which an appeal lies from his Court.

T. M. Venugopal Mudaliar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Horwill, J. S. A. No. 640 of 1936.
27th October, 1939.

Clubs and Associations—Suit by some members against the institution—When competent.

In an action by five members of an Association called "Ram Mohan Roy Free Library and Reading Room Association" against the members of the managing committee and a donor (who had given an unconditional gift of a room erected above the original premises) to restrain the defendants from affixing in the room the name of the donor or any other name except that of the Association.

Held, the giving of a particular name cannot be in contravention of any rules of the Association. If the society as a whole does not approve of the acts of its management, it has power by summoning a general meeting and passing a resolution to correct and control the acts of the management.

It is only when an act is *ultra vires* the society that a member is entitled to come to a Civil Court and have the Act declared to be void.

Even a member of a club cannot sue the management because it does some act which he disapproves provided of course he is not personally damnified by expulsion or punishment or by loss to property of which he may be a joint owner.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J.
30th October, 1939.

C. M. P. No: 3042 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Constitutional validity—Leave to appeal to Federal Court of India.

On the application of one of the parties to the Full Bench reference in *Mada Nagaratnam* v. *Puvvada Seshayya*, (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.), which held that the Madras Agriculturists Relief Act was *intra vires* the powers of the local legislature leave to appeal to the Federal Court of India was granted.

D. Narasaraju for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) for Respondent.

K. S.

Horwill, J.
31st October, 1939.

S. A. No. 611 of 1936.

Co-operative Societies Act (II of 1912)—Award by registrar on one loan—Sale in execution without mentioning another mortgage loan—Effect.

A purchaser in sale in execution of an award filed a suit for declaration that the property purchased by him was free of encumbrances as there was no mention of encumbrances in the sale proclamation.

Held, there was no duty cast upon the co-operative society to reveal their mortgage and so there was no estoppel.

65 M.L.J. 317, referred to.

Ch. Raghava Rao for Appellants.

A. Bhujanga Rao for Respondent.

K. S.

Patanjali Sastri, J.
31st October, 1939.

S. A. No. 585 of 1936.

Limitation—Mortgage suit—Application for final decree after time.

The first respondent having obtained a preliminary mortgage decree on 8th April, 1926, filed an application for the passing of

the final decree for sale on 27th October, 1933. The appellant who had even before the institution of the mortgage suit attached the same property in execution of his money decree and purchased it in execution on 6th July, 1931, opposed the application as barred by limitation. The respondent contended that as he was placed in possession of the mortgaged property in pursuance of a private sale from the mortgagor in July, 1926, pending the attachment in execution of the appellant's decree, his receipt of rents and profits of the property should be regarded as payments by the mortgagor within the meaning of S. 20 (2), Limitation Act, so as to extend the period of limitation each time such rents and profits were received.

Held, it cannot be said that the receipt of rents by the respondent as the owner of the property under his purchase from the judgment-debtor was a payment within the meaning of S. 20.

(1937) 2 M.L.J. 170 and 153 I.C. 462, applied.

35 C.L.J. 58 and A.I.R. 1938 Mad. 465, distinguished.

Held also, that the preliminary mortgage decree could not be deemed to have been satisfied by the private purchase from the mortgagor so as to stop the running of time.

I.L.R. 42 Mad. 61, applied.

S. Ramachandra Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. S.

Stodart, J. S. A. No. 754 of 1936.

3rd November, 1939.

Hindu Law—Joint family—Two brothers jointly trading but separately appropriating his share of profits—Bequest by one brother of his property—Validity—Property originally derived by brothers under will of maternal uncle—Effect.

Though the properties are derived by two brothers under the will of a maternal uncle, where they trade jointly but there was a separate appropriation by each brother of his share of the profits it is his separate property and a will by one brother bequeathing his property to his wife is valid.

I.L.R. 28 Mad. 363, distinguished.

I.L.R. 23 Cal. 980, referred to.

Ch. Raghava Rao, *M. V. Nagaramayya* and *R. Muthuswami* for Appellant.

V. Govindarajachari for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. P. No. 576 of 1939.
3rd November, 1939.

Criminal Procedure Code (V of 1898), S. 521—Defamatory passage in book—Conviction under Indian Penal Code, S. 500—Appropriate order for destruction and S. 521, Criminal Procedure Code.

The proper order under S. 521, Criminal Procedure Code, for destruction of defamatory passages contained in a publication after a conviction under S. 500, Indian Penal Code, is to direct deletion of the defamatory passages by means of destruction of those pages only, but not the destruction of the publication in its entirety.

D. Suryaprakasa Rao for Petitioner.

K. Ramamurti and *K. Someswara Rao* for Respondent.

K. S.

Venkataramana Rao and App. No. 271 of 1936.
Kunhi Raman, JJ.
7th November, 1939.

Sea Customs Act (VIII of 1878), S. 39—Crown's right to recover deficiency arising from short levy of customs duty.

The only contention of the Government was that the short levy was due to inadvertence or error due to forgetfulness. S. 39 of the Sea Customs Act is a section of a taxing Act and must be construed with strictness and in favour of the subject. If the Crown wants to rely on any specific ground which entitled them to recover the deficiency on the basis of a short levy it was incumbent on them to plead specifically such a ground and in the absence of such a plea it is not open to a Court to consider it.

V. V. Srinivasa Aiyangar, V. K. Parthasarathi and *V. V. Ramadurai* for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

K. S.

Venkataramana Rao, J. Application No. 1552 of 1939
9th November, 1939. in
O. P. No. 158 of 1938.

Bankruptcy proceedings—Mutual credits—Equitable set off—Fixed deposit amount with Bankers in joint names payable 'to either or survivor'—Overdraft account in the name of one of them—Evidence let in as to amount of fixed deposit belonging to the one who owed to the Bank money on the overdraft account.

Where an applicant in the liquidation proceedings of a Bank claimed set off against a certain amount, owing by him to the

Bank on an overdraft account in his sole name, the amount due on a fixed deposit receipt with the same Bank but standing in the joint names of himself and his mother in the either or survivor's account,

Held, on evidence, the fixed deposit amount having been found to have actually belonged to the applicant alone and not to the mother whose name was joint with him on the fixed deposit receipt, he was entitled to the set-off claimed.

Hart on the 'Law of Banking' Vol. I, pp. 309 and 310, followed.

(1879) 12 Ch. D. 491, relied on.

(1938) 2 K. B. 801, referred to.

The words "without any terms or any further inquiry" in the judgment of Brett, L. J., on page 502 of 12 Ch. D. 491, interpreted and explained.

The Government Pleader (B. Sitarama Rao) and *K. Chandrasekharan* for Applicant.

King and Partridge for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 1603 of 1939.
20th November, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 25—Necessity for stay of execution proceedings.

In view of S. 25 of the Madras Debt Conciliation Act, 1936 the provisions of which are mandatory the execuion petition pending in the Court cannot be proceeded with until the petition filed before the Board is dismissed.

(1938) 2 M.L.J. 1032, relied on.

S. Sitarama Aiyar and *S. Rajaraman* for Petitioner.

T. S. Venkatarama Aiyar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 349 of 1936.
2nd October, 1939.

Hindu Law—Maintenance—Permanently kept concubine though childless—If entitled to maintenance.

A permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless.

Spencer, J.'s *obiter dictum* in I.L.R. 48 Mad. 805, not followed.

10 B.H.C.R. 381, discussed.

I. L. R. 50 Bom. 604, referred.

K. Kameswara Rao and *B. S. Ramachandrudu* for Appellant.

P. Somasundaram for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 605 of 1936.
10th October, 1939.

Madras Estates Land Act (I of 1908), S. 125—Mortgage executed after passing of Act to pay off mortgage created before the Act—If mortgage created before Act by reason of right of subrogation.

It will be stretching the language of S. 125 far too much to hold that by reason of a right of subrogation arising out of it a mortgage should be deemed to be an encumbrance created before the passing of the Act, although in fact it was executed subsequent to the Act.

46 M.L.J. 380, applied.

Ch. Raghava Rao for Appellant.

K. Krishnamurthi for Respondent.

K. S.

Wadsworth and S. A. No. 510 of 1936.
Patanjali Sastri, JJ.
26th October, 1939.

Madras Irrigation Cess Act (VII of 1865), S. 1 (b) and Proviso 2—Irrigation of land registered under a particular Government work—Ryot storing water flowing from that work on his land in a private reservoir—If liable for penalty.

Per *Wadsworth, J.*—Where a ryot entitled to take water for irrigation from a particular government work, stores water flowing from that work on his land in a private reservoir does not justify the imposition of a penal water rate. The charge is leviable not by reason of the detriment to others caused by taking the water but by reason of the source from which the water is taken. The impounding of the water in the private reservoir cannot be held

to create a different or additional source other than that assigned by the revenue authorities.

Per *Patanjali Sastri, J.*—The act is one entailing penal consequences and should not be applied to any one who is not brought within its express language.

V. Govindarajachari for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

K. S.

Mockett and Krishnaswami Aiyangar, JJ. Appeal No. 190 of 1936.

27th October, 1939.

Hindu Law—Convert to Christianity—If can come back to Hinduism without performance of formal expiatory ceremonies.

Per *Krishnaswami Aiyangar, J.*—A Hindu having renounced Hinduism once can revert back to it. As to need for the formal expiatory ceremonies, *held*, emphasis is to be laid on the prevailing sentiments and usages of the community and it is its approval or disapproval which should be the governing factor. The absence of a ceremony of reconversion or any other expiatory ceremony does not render a return to Hinduism and marriage with a Hindu woman invalid and at the time of his death for purposes of succession he is governed by Hindu law.

Per *Mockett, J.*—There is no warrant for holding that it is necessary to have a formal renunciation of religion and proof of performance of expiatory ceremonies for the validity of a return to Hinduism.

B. Jagannadha Das and *C. V. Dikshatulu* for Appellants.

C. Sambasiva Rao and *S. Suryaprakasam* for Respondents.

K. S.

Horwill, J. S. A. Nos. 705 and 751 of 1936 and

31st October, 1939. A. A. O. No. 388 of 1936.

Hindu Law—Stridhanam—Anwadheyaka—Succession—Daughter's daughter—Preference—Difference between the Smriti Chandrika and Mitakshara—Preference.

The Mitakshara is the prevailing authority and in a competition between a widowed daughter and daughter's daughter to the succession to Anwadheyaka Stridhanam the daughter is preferred and the fact that she is a widow makes no difference.

M. S. Ramachandra Rao for Appellant.

K. Kameswara Rao and *M. Appa Rao* for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 232 of 1936.
3rd November, 1939.

Lease—Sub-lease for same rent—If absolute assignment of lease—English law as to if applicable.

It is no doubt true that in English law an underlease for the whole residue of the term operates as an assignment but as pointed out in I.L.R. 57 Cal. 1176 (P. C.), the law in India is different in this respect having regard to the provisions of the Transfer of Property Act. No question of assignment can therefore arise.

T. E. Ramabhadrachariar for Appellant.

M. Murugappa Chettiar for Respondent.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ. A. A. A. O. No. 135 of 1937.
3rd November, 1939.

Civil Procedure Code (V of 1908), S. 48—Limitation—Amendment of decree—Effect on time-barred decree.

A correction under S. 152, Civil Procedure Code, made in a time-barred decree still leaves the decree time barred. The amendment of a decree in conformity with the judgment does not have the effect of starting a fresh period of limitation.

Decision of Madhavan Nair and Cornish, JJ., in C. M. A. No. 264 of 1931 (unreported) overruled.

P. Satyanarayana Rao for Appellant.

A. Lakshmayya for Respondent.

K. S.

Abdur Rahman, J. S. A. No. 734 of 1936.
3rd November, 1939.

Transfer of Property Act (IV of 1882), S. 55—Unpaid vendor—Taking promissory note for balance of purchase money—Effect on statutory lien.

Where a suit though instituted on the basis of a promissory note was really for the recovery of the balance of the price which had not been paid to the plaintiffs and the promissory note was not accepted unconditionally, the statutory lien could not be lost until the defendant succeeded in proving a contract to the contrary.

The mere execution of the promissory note could not be regarded as tantamount to a "contract to the contrary" which will put an end to the statutory lien for the balance of consideration on a sale of immovable property.

Case-law discussed.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

M. S. Ramachandra Rao for Respondents.

K. S.

Abdur Rahman, J. S. A. Nos. 804 and 805 of 1936.

7th November, 1939.

Second appeal—Interpretation of document of title—If a question of law which can be gone into in second appeal—Finding of fact arrived at on incorrect construction—Interference.

The interpretation of a document of title is a question of law and a finding of fact arrived at by the Subordinate Judge upon an incorrect construction of the documents of title is not binding in second appeal and the view on such documents can be considered in second appeal.

Case-law reviewed.

S. Narayana Aiyangar for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 714 of 1938.

9th November, 1939.

Provincial Insolvency Act (III of 1907), S. 66 (2)—Insolvency of a Hindu father—Right of daughter to have her marriage expenses from her father—If can have preference over the creditors of insolvent.

Held, on an examination of the authorities that it is not possible to contend that the daughter of a Hindu insolvent is entitled as a matter of right to claim her marriage expenses from out of the estate of the insolvent as against the creditors of the insolvent.

V. Viyyanna for Petitioner.

D. Narasaraju for Respondents.

K. S.

Kunhi Raman, J. A. A. O. No. 465 of 1937.

20th November, 1939.

*Civil Procedure Code (V of 1908), O. 32, r. 3—Duly appointed guardian of minor appellant in existence—*Locus standi *of another person to come forward as next friend.*

So long as there was a duly appointed guardian of a minor, no other person had any *locus standi* to come forward as his next friend.

M. S. Ramachandra Rao for Appellant.

K. Kameswara Rao for Respondent,

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1025 of 1936.
26th October, 1939.

Civil Procedure Code (V of 1908), S. 73—Different decrees of same Court for payment of money—Judgment-debtors same—Transfer of assets to credit of suit, decree in which was executed —Application by decree-holder who had attached before judgment in the other suit for rateable distribution—Rights to.

Where the assets are held in a different suit though on the file of the same Court the receipt of those assets within the meaning of S. 73 occurs only when and not later than the date of the actual transfer of the money from the suit in which it first came into Court to the suit in which the application for rateable distribution comes to be considered.

I.L.R. 44 Mad. 100 (F.B.), referred.

Petitioners obtained a decree in suit *A* for recovery of money and after attachment and execution a sum of Rs. 6,000, which stood to the credit of the judgment-debtor in another suit *B* in the same Court was transferred to the credit of the suit, in which execution had been taken, on 7th September, 1935 and on 12th October, 1935, petitioner applied for payment out. The respondent, another decree-holder against the same judgment-debtor had attached before judgment the amount originally standing to the credit of suit *B*. The respondent's decree was dated 28th September, 1935, three weeks after transfer of the money to credit of suit *A* had been made. Respondent on 17th October, 1935, made an application for execution and for rateable distribution of the amount standing to credit of suit *A*.

Held, the respondent's attachment before judgment conferred no rights and as there was no application for execution or for rateable distribution in suit *A* before the date of the receipt of the assets (7th September, 1935), his claim to rateable distribution is unsustainable.

A. C. Sampath Aiyangar for Petitioner.

K. Rajah Aiyar for Respondent.

K. S.

Stodart, J. S. A. No. 743 of 1936.
2nd November, 1939.

Civil Procedure Code (V of 1908), O. 34, r. 6—Personal remedy under mortgage barred—Effect on right to personal remedy for costs of mortgage suit.

The costs of the suit which are embodied in the amount declared due under the preliminary decree are intended to be re-

covered in the same manner and along with as the mortgage money and in no other manner and if the decree-holder is not entitled to have a personal decree for the recovery of any balance of the mortgage debt proper (here it was barred by limitation) he is equally not entitled to have a personal decree for any balance of the amount due as costs of the suit.

I.L.R. 14 Rang. 538, relied on.

Case-law discussed.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Appellant.

S. V. Rama Aiyangar for Respondent.

K. S.

Abdur Rahman, J. A. A. O. Nos. 360 and 450 of 1939
16th November, 1939. and C. M. P. No. 4642 of 1939.

Practice—Temporary injunctions and orders on interlocutory applications—Duty of Courts to avoid expressions of opinion on the main points of controversy which have to be determined in the suit—Interim injunctions—Principles on which to be issued—Evidence Act, S. 114 (d)—Presumption as to continuance of tenants in possession—Limits.

The Subordinate Courts should as far as possible, in passing orders on interlocutory applications and granting temporary injunctions, avoid expressions of their opinion which may lead the parties or higher Courts to apprehend that they have finally made up their minds on the main points of controversy which have to be determined in the suits and have been thus committed to a view from which they would find it difficult to extricate themselves at the time when they are disposing of them finally. The person who comes to Court and asks for a temporary injunction is not required to make out a legal title before the Court orders it to be issued but he must satisfy the Court (*a*) that he has a *bona fide* claim and that there is a serious question to try in regard to the existence of the legal right which he asserts; (*b*) that he has a strong *prima facie* case in support of the title which he sets up, or in other words, that there is a probability of his success; (*c*) that the balance of inconvenience caused to the party asking for an injunction will be greater if the injunction is not granted than if it is; and (*d*) that it is necessary for the Court to interfere and protect him from a grave or irreparable injury or serious damage before a suit is heard and finally decided.

If a tenant was in possession of a property in 1933, he cannot be presumed to be in possession of the property in 1939 unless he shows that he was actually in possession in that year.

K. Rajah Aiyar, K. S. Desikan and *K. Raman* for Appellants.
V. Ramaswami Aiyar for Respondents.
K. S.

Kunhi Raman, J. C. R. P. No. 1657 of 1938.
17th November, 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 10, sub-S. 2 (2)—Mortgage for price of land purchased—If excepted from scaling down by reason of S. 10, sub-S. 2 (2)—Subsequent mortgage of other property for original mortgage debt—Effect.

A mortgage was executed for Rs. 7,000 on 4th November, 1914, the whole of the mortgage debt being the price payable by the mortgagors for lands purchased by them from the mortgagees and subsequent to the mortgage there was a partition among the mortgagors and after the partition the mortgage debt was split up and a subsequent mortgage for Rs. 2,500 of other ancestral properties was executed by the new mortgagor for the portion of the debt that fell to him and a decree was passed on that mortgage. When it was sought to be scaled down under S. 19 of Act IV of 1938,

Held, that S. 10, sub-S. 2 (2) of Act IV of 1938 is a sufficient answer to the petition for scaling down. In view of the scheme of the Act the giving of other property as security did not affect the applicability of the clause in S. 10 as to the lien for unpaid purchase-money.

K. P. Ramakrishna Aiyar for Petitioner.
K. S. Ramabhadra Aiyar for Respondent.
K. S.

Stodart, J. C. R. P. No. 1852 of 1939.
17th November, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 and 10 (2)—Pronote of 1935 for balance of interest on unpaid purchase-money under sale-deed of 1931—Debt under—If wiped out as interest outstanding by S. 8 of the Act—S. 10 (2)—If applicable.

For price of land sold defendant executed a pronote in 1931. In 1935 interest amounting to Rs. 900 was due on this promissory note. Defendants paid Rs. 760 towards that in cash and executed a new subsidiary pronote for the balance, namely, Rs. 140. In a suit to recover this amount,

Held, that S. 10 (2) is not applicable to the case as this small fragment of the sum is not charged under S. 55 (4) of the Transfer of Property Act. The money is not unpaid purchase-money and is wiped out as interest outstanding by S. 8 of Act IV of 1938,

V. T. Rangaswami Aiyangar for Petitioner.
K. S.

Wadsworth and Patanjali Sastri, JJ. A.A.O. Nos. 125 and 126 of 1939.
22nd November, 1939.

Indian Tea Control Act (VIII of 1938), S. 23, Rules framed under—Rule 4 and schedule to it—Validity.

The effect of the rules is that in ascertaining the crop basis of a particular estate you work it out in accordance with the pre-existing rules under the 1933 Act and to that figure you make an addition which is arrived at by taking the appropriate figure for the locality in Schedule I to r. 4 and deducting therefrom the young clearings allowance (which has already been in the crop basis as calculated under the old rules) and also the yield from young areas which has contributed to the figure for the production of their estate (taken into consideration in arriving at the crop basis under the old rules).

In the present suit the estate which is almost entirely made up of young tea gets no addition at all, for the two deductions in rule 4 (*b*) (1) and (2) together exceed the amount of young clearings allowance to which the estate would be entitled with reference to the figure in Schedule I. It was contended that this rule is *ultra vires* in so far as it provides for deductions from the figure of young clearings allowance laid down in Schedule I.

Held, there is no reason to hold that the provision in the rule for making these deductions in arriving at the figure of additions is *ultra vires*. Nor is it possible to hold that it is possible to treat the schedule to r. 4 as something apart from r. 4 which can operate without regard to the provisions of the rule of which it forms an integral part.

T. R. Venkatarama Sastri, T. B. Balagopal and *S. A. P. Alvares* for Appellant.

Nugent Grant instructed by *King* and *Partridge* for Respondent.

K. S.

Kunhi Raman, J. S. A. No. 853 of 1936.
22nd November, 1939.

Promissory note—Endorsement without consideration—Suit on pronote—Plea of discharge by the defendant—If barred by failure to take back discharged pronote.

Where in a suit by the endorsee without consideration of a promissory note the defendant raised a plea of discharge, the endorsee contended that the defendant was estopped from pleading discharge as against an endorsee because by reason of the defendant's negligence in not taking back the promissory note the plaintiff had been induced to take an endorsement of the pronote.

Held, the objection is not tenable as the endorsement was found to be without consideration.

In any event there was no duty cast upon the defendant so far as the plaintiff is concerned to get back the document when he is alleged to have discharged the debt and in the absence of evidence of any negligence on his part the rule of estoppel cannot apply.

Case-law discussed.

M. Murugappa Chettiar for Appellant.

S. Srinivasan for Respondent.

K. S.

Stodart, J. C.R.P. No. 1962 of 1939.
28th November, 1939.

Madras Agriculturists Relief Act (IV of 1938)—Pronotes standing in the name of father—Renewal in name of son—If in favour of same creditor under S. 8, Explanation—Definition of "creditor" in S. 3 (v)—Applicability—Debtor—If to be same for applicability of S. 8—Legal representatives of original debtor—Rights of.

Where the renewal of a promissory note is in favour of the heir of the promisee who was ill, he will come under the definition of a creditor in S. 3 (*v*) of the Act. So too an assignee of a prior promisee.

Sec. 8 does not lay down that under the explanation to the section the debtor must be the same. A change in "debtors" especially where he is the legal representative of the original debtor does not debar him from claiming the reliefs under the Act in the payment of those debts.

T. E. Ramabadrachariar for Petitioner.

K. S.

The Chief Justice and
Krishnaswami Ayyangar, J. Application No. 1900 of 1939.
8th December, 1939.

Madras City Municipal Act (IV of 1919), S. 287—Power of Commissioner of Corporation to refuse to renew a license to carry on a business of manufacturing beedis in a particular premises.

In an application for the issue of a writ of certiorari against the refusal of the commissioner to renew a license to carry on a business of manufacturing beedis in a particular premises,

Held that, there is nothing in S. 287 which indicates an intention on the part of the legislature to withhold power of refusal to renew a license if the circumstances of the case demanded.

S. 287 must be construed according to the wording within the four corners Commissioner has in a proper case power to refuse a license.

T. R. Venkatarama Sastri and *K. S. Rajagopala Aiyangar* for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *A. Suryanarayana* for the Commissioner.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1129 of 1939.
11th December, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Order under—Revision—Provision of right of appeal against such orders by the new rules—If retrospective—Effect on competency of pending revision petitions—S. 3 (Proviso) and S. 27—Certificate as to assessment to house tax of debtor filed in evidence—Finding of Munsif contrary to the certificate without other evidence on record—Revision.

The petitioner claiming to be an agriculturist applied for the amendment of the decree against him under S. 19 of Act IV of 1938. The District Munsif dismissed the petition on 4th May, 1939. The petitioner then filed the present petition under S. 115 of Civil Procedure Code for revision of the Munsif's order. The respondent raised the objection that the petition for revision does not lie because the amended rules under the Act dated 27th October, 1939 provided an appeal against the orders under S. 19.

Held: The amended rules cannot have retrospective effect and do not govern the present case.

On the merits *held*, where the certificate issued under S. 27 of the Act (of assessment to house-tax) showed that the petitioner was an agriculturist for the purposes of the Act and the respondent did not insist on the assessment register being produced, and unless the certificates were incorrect the Munsif had no right to refuse the petitioner's claim that he was an agriculturist, the decision of the Munsif is clearly perverse and must be reversed as it was a material irregularity in the exercise of his jurisdiction.

A. C. Sampath Ayyangar for Petitioner.

T. E. Ramabadrachariar for Respondent.

K. S.

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NOTES OF INDIAN CASES.

DHONDO NARAYAN SHIRALKAR *v.* ANNAJI PANDURANG KOKATNUR, I.L.R. (1939) Bom. 66.

The question in this case related to the right of an appellant to withdraw his appeal and the learned Judges have held that he is entitled as of right to withdraw his appeal provided that the respondent has not acquired any interest thereunder. If the respondent has obtained any rights under the appeal, the learned Judges have held that the appellant can withdraw the appeal only with the permission of the Court. The rules as to withdrawal of suits in this country from the time of the Civil Procedure Code of 1859 are so dissimilar to those of the old English rules as to non-suit at common law and the plaintiff's right to have his bill dismissed in equity and the rules of the Supreme Court under O. 26 of the English rules which have superseded them that no useful purpose can be served by looking for light from the English law on the point. So far as this country is concerned, O. 23, r. 1 of the Civil Procedure Code only applies to suits and does not deal with withdrawal of appeals and Sir John Beaumont, C.J., has observed in this case that any reference to S. 107 of the Civil Procedure Code will not improve matters as it can only enable an appellant to withdraw the suit and not the appeal. In this connection it was observed as early as *Ram Pershad Ojha* v. *Bhurosa Koonwar*[1], that the corresponding provisions of the old Civil Procedure Code of 1859 entitled the appellant to withdraw his appeal as of right. The Madras High Court however in an old case in

1. (1868) 9 W.R. 328.

Kareem Bee v. *Beegam Bee*[1] held that there was no provision in the Code of 1859 to enable the appellant to withdraw his appeal as of right and that he could do so only with the leave of the appellate Court in all cases. The Allahabad High Court in the recent case of *Kanhaya Lal* v. *Partab Chand*[2] has however held that under the present Code reading the provisions of O. 23, r. 1 along with S. 107 (2), the appellant can withdraw his appeal unconditionally, his only liability being to pay the costs of the respondent. This view is opposed to what the learned Judges have laid down in the case under notice and the learned Judges have not in their judgment dealt with this Allahabad case. If this view of the interpretation of the provisions of the Civil Procedure Code is correct, it is doubtful whether any leave of the appellate Court is necessary for the appellant withdrawing his appeal even though the respondent may have obtained some rights as in this case, because the terms of O. 23, r. 1 (1) are clear in requiring no leave or permission of the Court. If, on the other hand, the correct view is that there is no provision in the Code relating to this matter and it has to be dealt with under the inherent powers of the Court, there is every justification for the appellant not nullifying the rights of the respondent, if any, in the appeal and his being allowed to withdraw the appeal only with the permission of the Court. We are not sure whether the learned Judges will regard the right of the respondent under O. 41, r. 33 of the Code to relief even though he has preferred no memorandum of cross-objections to be such a substantial right which will prevent the appellant from withdrawing the appeal without the permission of the Court. If, however, the respondent has been completely successful in the first Court and can get nothing more, the appellant even according to the learned Judges in this case, can withdraw his appeal without any permission from the Court.

TUKARAM GANPATRAO SURVE *v.* ATMARAM VINAYAK GONDHALEKAR, I.L.R. (1939) Bom. 71.

We had occasion to consider the retrospective operation of S. 53-A of the Transfer of Property Act in commenting on the decision of the Calcutta High Court in *Mahammad*

1. (1867) 3 M.H.C.R. 368: 2 Mad. Jur. 332.
2. (1931) A.L.J. 232.

Hosain v. *Jamini Nath Bhattacharjya*[1] at p. 11 of the Notes of Indian Cases in (1938) 2 M.L.J. The decisions which had appeared till then will be found collected in that note. This decision which has been given since then takes the same view as the one taken in *Mahammad Hosain* v. *Jamini Nath Bhattacharjya*[1] and holds that the section is retrospective in its operation. This case cannot put an end to the conflict on the question. The authority of this decision is to some extent weaker because the two decisions on which the learned Judges have relied, namely, the decisions in *Mahammad Hosain* v. *Jamini Nath Bhattacharjya*[1] and *Wakefield* v. *Kumar Rani Sayeeda Khatun*[2] have since been dissented from in *Jagdamba Prasad Lalla* v. *Anadi Nath Roy*[3] which we have noticed in the note referred to above. Further, even the Calcutta High Court in a later case in *Mohendra Narayan Roy Chowdhury* v. *Profulla Kumar Guha*[4] has held that the weight of authority is against retrospective effect being given to the section. Reference may also be made in this connection to the latest case of the Patna High Court in *Baldeo Singh* v. *Sheikh Muhammad Akhtar*[5]. The learned Judges in the case under notice have observed that there is no difference between the retrospective operation of S. 53-A and S. 92 of the Transfer of Property Act as amended and referred to *Tota Ram* v. *Ram Lal*[6] in support of the retrospective operation of the latter section. With reference to S. 92, we would refer to the latest case in *Srinivasulu Naidu* v. *Damodaraswami Naidu*[7], where all the relevant points are considered and the decisions referred to and the conclusion arrived at that S. 92 is not retrospective in its effect. Under these circumstances, nothing but a decision of the Privy Council will settle the question finally, unless the legislature sets the conflict at rest.

REVAPPA NANDAPPA HATTARKI (FIRM) *v.* BABU SIDAPPA ERANDOLE, I.L.R. (1939) Bom. 104.

The question whether S. 69 (2) of the Indian Partnership Act bars suits after the coming into force of the Act by unregis-

1. I.L.R. (1938) 1 Cal. 607.
2. (1936) I.L.R. 15 Pat. 786.
3. (1938) I.L.R. 17 Pat. 460.
4. A.I.R. 1938 Cal. 795.
5. (1939) 20 P.L.T. 399: 1939 P.W.N. 331.
6. (1932) I.L.R. 54 All. 897 (F.B.).
7. A.I.R. 1938 Mad. 779.

tered firms in respect of causes of action existing prior to the coming into force of the Indian Partnership Act has been the subject of conflicting decisions. It was held in *Surendra Nath De* v. *Manohar De*[1] that such suits were not saved by the provisions of S. 74 (*b*) of the Act which were held to be confined to proceedings pending at the date when the Act came into force. This view was held to be confirmed by the terms of S. 1 (3) of the Act which gave one year's time for the provisions of S. 69 coming into force, thus enabling existing firms to register themselves or bring suits in the meanwhile. This view was followed by the Madras, Patna and Lahore High Courts in *Parinchu* v. *Ravi Varma*[2], *Sundararaja Aiyangar* v. *Mannarswami (Firm)*[3], *Firm of Syed Ibrahim Sahib* v. *Gurulinga Aiyar*[4], *Shazad Khan* v. *Darbar Baber Kuchhi*[5], *(Firm) Krishan Lal-Ram Lal* v. *Abdul Ghafur Khan*[6] and by Bennet, J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[7]. This view proceeded on a narrow view of S. 74 (*b*) that it referred only to pending proceedings and not subsequent proceedings on pre-existing causes of actions as well. That this view is incorrect was pointed out by Sir Shah Sulaiman, C. J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[7] and has since been followed in *Girdharilal Son & Co.* v. *Kappini Gowder*[8], *Soonoiram* v. *Junjilal*[9] and the case now under notice. After this decision was reported in *Revappa* v. *Babu Sidappa*[10], it has been followed by the Madras High Court in L. P. A. No. 74 of 1937 (16th March, 1939), (1939) 1 M.L.J. 35 (Notes of Recent Cases) which has not yet been fully reported. We venture respectfully to submit that the fuller examination of the terms of S. 74 (*b*) in these decisions will have the effect of changing the course of decisions in the Calcutta, Lahore and Patna High Courts.

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1. (1934) I.L.R. 62 Cal. 213.
2. (1936) 45 L.W. 276.
3. (1937) 1 M.L.J. 610.
4. (1937) 2 M.L.J 717.
5. (1936) I.L.R. 15 Pat. 810: A.I.R. 1937 Pat. 16.
6. (1935) I.L.R. 17 Lah. 275: A.I.R. 1935 Lah. 893.
7. (1935) I.L.R. 58 All. 495.
8. (1938) 2 M.L.J. 44.
9. A.I.R. 1938 Rang. 273 (F.B.).
10. (1938) 40 Bom.L.R. 1275.

MURADAN SARDAR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I.L.R. (1939) 1 Cal. 425.

The main point decided in this case is whether the period of three months fixed in S. 9, sub-S. (1), cl. (*c*) of the Provincial Insolvency Act can be extended with reference to S. 5 of the Indian Limitation Act by virtue of the provisions of S. 78 of the former Act. The learned judges have held that the period prescribed in S. 9, sub-S. (1), cl. (*c*) is not a period of limitation and so cannot be extended thus taking the same view as the Full Bench of the Madras High Court in *Chenchuramana* v. *Arunachalam*[1].

In coming to this conclusion, one of the learned judges has relied on the marginal note to S. 9 as showing the drift of the section and quoted the authority of Collins, M.R., in *Bushell* v. *Hammond*[2]. Within two months after the case in *Bushell* v. *Hammond*[2], the question of the value of the marginal notes in Indian enactments came up before the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*[3] and Lord Macnaghten delivering the opinion of the Privy Council said that it was well settled that marginal notes to the sections of an act of Parliament could not be referred to for the purpose of construing the Act and that the contrary opinion originated in a mistake which was exploded long ago. His Lordship also said that there was no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament. This decision of the Privy Council is binding on the Indian Courts and has been since generally followed. (*See* In re *Syamo Maha Patro*[4] and *Sir Dhunjibhoy Bomanji* v. *Ganpa Khandu Goli*[5].) The Allahabad High Court however in a Full Bench decision in *Ram Saran Das* v. *Bhagwat Prasad*[6], canvassed this proposition and observed that marginal notes were the subjects of discussion and resolution in the legislative councils and were therefore useful guides in construing the sections. It must however be noticed that even King, J., who delivered the leading judgment in this case observed at page 425 that when finally the bill was taken into consideration in the Council, the marginal notes were

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).
2. (1904) 2 K.B. 563.
3. (1904) L.R. 31 I A. 132: I.L.R. 26 All. 393 (P.C.).
4. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.).
5. (1932) I.L.R. 57 Bom. 699,
6. (1928) I.L.R. 51 All. 411 (F.B.).

not ordinarily read out and formally passed by the Council along with the clauses. This seems to indicate that they are not parts of the enactments but are considered in the discussions of the legislature. It is well settled that discussions in the legislature alone are not to be referred to in construing the enactment. This was laid down by the Privy Council in *The Administrator-General of Bengal* v. *Premlal Mullick*[1] and *Krishna Aiyangar* v. *Nallaperumal Pillai*[2]. Rangnekar, J., followed the view regarding the value of the marginal notes of the Allahabad Full Bench in *Emperor* v. *Sayad Esmail*[3], but subsequently retracted from the same in *Dharwar Urban Bank, Ltd.* v. *Krishnarao Anantrao Konur*[4] and followed the view of the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*[5] that marginal notes should not be referred to in construing Indian enactments.

Even in England the weight of authority is against referring to the marginal notes in construing Acts of Parliament, though the reason that is given is that they are not considered by the Parliament and are not part of the Act. It is difficult to see the force of the observation of Collins, M.R., in *Bushell* v. *Hammond*[6], when he says that marginal notes do not form a part of the Act, but still they can be used to show the drift of the Act. In fact, in England the question has been discussed and it has been held in later cases that marginal notes cannot be referred to for construing Acts of Parliament in *Thomas* v. *Jones*[7], *Wilkes* v. *Goodwin*[8] and *Nixon* v. *Attorney-General*[9] following *Attorney-General* v. *Great Eastern Railway Company*[10].

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1. (1895) L R. 22 I.A. 107 : I.L R. 22 Cal. 788 at 799 and 800 (P.C.).
2. (1919) 38 M.L.J. 444 : L.R. 47 I.A. 33 : I.L.R. 43 Mad. 550 at 564 and 565 (P C.).
3. (1933) I L.R. 57 Bom. 537 (F.B.).
4. I.L.R. (1937) Bom. 293 : A.I.R. 1937 Bom. 198.
5. (1904) L.R. 31 I.A. 132 : I.L.R. 26 All. 393 (P.C.).
6. (1904) 2 K.B. 563.
7. (1921) 1 K.B. 22 at 35.
8. (1923) 2 K.B. 86 at 100.
9. (1930) 1 Ch. 566 at 593 and 594.
10. (1879) 11 Ch. D. 449.

MADHAB CHANDRA GHOSH *v.* NIRODE CHANDRA GHOSH, I.L.R. (1939) 1 Cal. 574.

In this case, a false report was made to the police which was followed by two other reports of a similar nature as a result of which the police started investigation and launched prosecutions which failed. The persons who made the reports to the police deposed in support of their reports in the prosecution. The accused who was acquitted brought a suit for damages based upon the statements made to the police and the depositions in the judicial proceedings. The learned judges have held that the plaintiff is not entitled to succeed, as the suit was one for defamation and the defendants were absolutely privileged.

On the question of absolute privilege, this decision is reminiscent of the old controversy whether in a suit for damages for defamation in this country the defence of absolute privilege is available to parties to proceedings as distinguished from the witnesses. It was held in one line of cases that the privilege was only of a qualified nature and not absolute. Reference may be made in this connection to the decisions in *Augada Ram Shaha* v. *Nemai Chand Shaha*[1], *H. P. Sandyal* v. *Bhaba Sundari Debi*[2], *Raghavendra* v. *Kashinathbhat*[3] and the view of Beachcroft, J., in *C. H. Crowdy* v. *L. O. Reilly*[4]. The weight of authority however has been the other way and it has been held that parties no less than witnesses are entitled to absolute privilege. (See *Pachaiperumal Chettiar* v. *Dasi Thangam*[5], *Chunni Lal* v. *Narsingh Das*[6], *Satish Chandra Chakravarti* v. *Ram Doyal De*[7] and *Ram Kirat Kamkar* v. *Biseswar Nath*[8].) The learned judges in the case under notice have followed the course of authority in the latter cases and held that parties to proceedings also enjoy absolute privilege and not merely a qualified privilege. The Madras High Court at one time went to the length of saying that the rule as to absolute privilege was a defence not only to civil proceedings but also to criminal prosecutions for defamation in In re *P. Venkata Reddy*[9]. The fallacy underlying this

1. (1896) I.L.R. 23 Cal. 867.
2. (1910) 15 C.W.N. 995.
3. (1894) I.L.R. 19 Bom. 717 at 723.
4. (1912) 17 C.W.N. 554.
5. (1908) 13 M.L.J. 353 : I.L.R. 31 Mad. 400.
6. (1917) I.L.R. 40 All. 341 (F.B.).
7. (1920) I.L.R. 48 Cal. 388 (S.B.).
8. (1932) I.L.R. 11 Pat. 693.
9. (1912) 23 M.L.J. 39 : I.L.R. 36 Mad. 216 (F.B.).

view was however brought out in *Satish Chandra Chakravarti* v. *Ram Doyal De*[1] after an exhaustive review of the decisions and the principles underlying the same by Mookerjee, A. C. J., in delivering the judgment of the Special Bench in that case. The decision of the Madras High Court in In re *P. Venkata Reddy*[2] has since been overruled in *Thiruvengada Mudali* (*Accused*) v. *Thirupurasundari Ammal* (*Complainant*)[3] so far as criminal proceedings are concerned.

There is however one observation of one of the learned judges in the case under review where the learned judge observes as an objection to treating the present suit as one for damages for malicious prosecution, that the prosecutor was a Sub-Inspector of Police and the present defendants were not the prosecutors. This observation of the learned judge ought not to be understood as meaning that in no case of police prosecutions an action for malicious prosecution would lie against a private individual. It is not a principle of universal application that if the police act upon an information given by a private individual, that individual does not become the prosecutor. It is a question of fact in each case as pointed out by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh*[4]. On the other hand, as observed by their Lordships in *Balbhaddar Singh* v. *Badri Sah*[5], the giving of information to the authorities by an individual which naturally leads to the starting of a prosecution will amount to prosecution by the person who gave the information and will ground an action in tort for malicious prosecution against him. (See also *Periya Goundan* v. *Kuppa Goundan*[6], *Gogineni Venkatappayya* v. *Yerramneni Ramakrishnamma*[7], *Jagadamba Prasad* v. *Raghunandan*[8], *Ram Kishun Prasad* v. *Ram Narain Prasad*[9] and *Radha Kishan* v. *Kedar Nath*[10].)

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1. (1920) I.L.R. 48 Cal. 388 (S.B.).
2. (1912) 23 M.L.J. 39: I.L.R. 36 Mad. 216 (F.B.).
3. (1926) 51 M.L.J. 112: I.L.R. 49 Mad. 728 (F.B.).
4. (1908) 18 M.L.J. 394: L.R. 35 I.A. 189: I.L.R. 30 All. 525 (P.C.).
5. (1926) 51 M.L.J. 42: I.L.R. 1 Luck. 215 (P.C.).
6. (1919) 37 M.L.J. 234: I.L.R. 42 Mad. 880.
7. (1931) 62 M.L.J. 107.
8. (1920) 57 I.C. 392.
9. A.I.R. 1934 Pat. 14.
10. (1924) I.L.R. 46 All. 815.

JOHN MINAS APCAR *v.* LOUIS CAIRD MALCHUS, I.L.R. (1939) 1 Cal. 389.

In cases of innocent as well as fraudulent misrepresentation, the mere existence of the means of discovering the truth with ordinary diligence by the representee is not a defence in English law to any action based on the misrepresentation whether for damages or for the rescission of the contract. The only defences available are actual knowledge of the truth,—not merely constructive or imputed knowledge, as through an agent—and an agreement by the representee to waive enquiry as to the truth of the representation. It is settled in England that apart from a definite agreement to waive enquiry as to the truth of the representations, the mere existence of means of discovering the truth is not a ground which would disentitle the representee from rescinding the contract. The reason for the English rule has been stated to be that no man can complain that another has confided in a misrepresentation made, even if innocently, much less if fraudulently, for the purpose of inspiring that very confidence or plead as an excuse that he whom he has misled was wanting in sagacity or diligence in not testing the statement by enquiry. The English law and the cases on the subject will be found mentioned in Halsbury's Laws of England, Hailsham Edition, Volume 23 at pages 84 to 88 and at page 108 of the same volume. This being the English law on the point, the Indian law has effected a complete departure from it by enacting the exception to S. 19 of the Indian Contract Act to the effect that the existence of the means of finding out the truth is a defence to an action for avoiding a contract on the ground of silence which amounts to fraud within the meaning of S. 17 and on the ground of misrepresentation. This is what has been pointed out by Sir Frederick Pollock and Sir Dinsha Mulla in their commentaries on the Indian Contract Act at pages 128 and 129 of their sixth edition. Though in the opening sentence, they say that there is a departure from the English law, they are not so positive as they proceed in commenting on the exception. It is difficult to see any ambiguity in the language of the exception to S. 19 to warrant the view of the learned judges in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1], that the English law has been kept up in this country. To this extent, the observations of Lort Williams,

1. (1930) I.L.R 53 All. 374.

J., in the case under notice about the statement in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1] seem, with all respect, to be well founded.

On the main point in the case whether the words "fraudulent within the meaning of S. 17" qualify not merely "silence" but also "misrepresentation", the learned judges follow the reasoning and the conclusion of the decision in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1] to the effect that they only qualify "silence" and not "misrepresentation". It may be observed that this view was expressed as early as *Morgan* v. *The Government of Hyderabad*[2], though the point was not discussed so fully by the learned judges in that case.

SHIVAPPA BASAPPA KATTI AND MAHADEVAPPA BASAPPA KATTI *v.* RAO SAHEB VIRAPPA ANDANEPPA MANVI, I.L.R. (1939) Bom. 271.

The interpretation of the expression "assignment by operation of law" in O. 21, r. 16 of the Civil Procedure Code relating to execution of decrees has led to a conflict of opinion by reason of the practical difficulties in its working. As early as 1876, in *Abedoonisa Khatoon* v. *Ameeroonissa Khatoon*[3], it was held by the Privy Council when a decree was obtained by a widow as representing the estate of the deceased husband, a posthumous son who claimed an interest in the decree could not come in under S. 208 of the Civil Procedure Code of 1859 corresponding to O. 21, r. 16 of the present Code. Their Lordships held that no incident had occurred on which the law could operate to transfer any estate from his mother to him. In the words of their Lordships, there was no death, no devolution or succession from the mother to the posthumous son of any interest in the decree. This decision of the Privy Council has led to a restrictive interpretation of the expression "assignment by operation of law" in O. 21, r. 16 as comprising only cases of strict assignment from the decree-holder, such as by death, insolvency or an execution sale of his interest, see *Mahadeo Baburao-*

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1. (1930) I.L.R. 53 All. 374. 2. (1888) I.L.R. 11 Mad. 419.
3. (1876) L.R. 4 I.A. 66: I.L.R. 2 Cal. 327 (P.C.).

Halbe v. *Anandrao Shankarrao Deshmukh*[1], *Sankaranarayana Menon* v. *Vasu Menon*[2] and the case under notice. On the other hand, a more extended meaning has been given to the expression, as including cases where it was declared that the decree really belonged to another, though it did not stand in his name and therefore it was held that he was entitled to execute the decree in *Ramaswami* v. *Anda Pillai*[3] and *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[4]. Where a decree was obtained in the name of an executor and the probate was subsequently revoked, the heir of the deceased was held to come under the terms of O. 21, r. 16 in *Umasoondury Dassy* v. *Brojonath Bhuttacharjee*[5]. It was also held that where a trustee obtained a decree the beneficiary could come in under that provision. (See *Gobind Singh* v. *Gopal Saran Singh*[6].) Reference may also be made in this connection to *Manorath Das* v. *Ambika Kanta Bose*[7], *Purmananddas Jiwandas* v. *Vallabdas Wallji*[8] and *Khanderav Rayajirav* v. *Ganesh Shastri*[9]. These decisions are based on the obvious practical difficulty to the real owner realising the money, if the person in whose name the decree stands should deprive him of the fruits of the decree by taking them himself or colluding with the judgment-debtor. These are not considerations which should be lightly discarded in doing justice. It has sometimes been said that "the holder of a decree" within the meaning of O. 21, r. 10 is wider than the term "decree-holder" as defined in S. 2 (3) of the Civil Procedure Code and that a person for whose benefit also a decree has been obtained can execute the decree under O. 21, r. 10, though the decree may not stand in his name, even without resorting to O. 21, r. 16 (See *Akhori Ramsewak Prasad* v. *Saran Singh*[10].) But this view has not been accepted in (1939) 2 M.L.J. (Notes of Recent Cases) 16. It is however necessary to protect the interests of the real owners from any misconduct on the part of the nominal decree-holders. It is thus a matter for the High Courts in the exercise of their rule-making power to see whether O. 21, r. 16 may not be suitably altered to meet the

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1. (1933) I.L.R. 57 Bom. 513.
2. (1934) 67 M.L.J. 87.
3. (1890) 1 M.L.J. 240 : I.L.R. 14 Mad. 252.
4. (1902) 12 M.L.J. 348.
5. (1889) I.L.R. 16 Cal. 347.
6. A.I.R. 1924 Pat. 343.
7. (1909) 1 I.C. 57.
8. (1887) I.L.R. 11 Bom. 506.
9. (1887) I.L.R. 11 Bom. 368.
10. A.I.R. 1937 Pat. 607.

needs of the real persons entitled to the benefits under the decree. In this connection, it is necessary to notice that there is a difference of opinion on the question whether a benami transferee of a decree is entitled to execute the decree or the real owner can execute it. (*Palaniappa Chettiar* v. *Subramania Chettiar*[1], *Sankaranarayana Menon* v. *Vasu Menon*[2], *Gurdial Singh* v. *Gurbakhsh Singh*[3] and *Kamta Prasad* v. *Indomati*[4]. *See* contra *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*[5] and *Balkishen Das* v. *Bedmati Koer*[6]).

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1. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
2. (1934) 67 M.L.J. 87.
3. (1926) I.L.R. 8 Lah. 35.
4. (1915) I.L.R. 37 All. 414.
5. (1889) I.L.R. 16 Cal. 355.
6. (1892) I.L.R. 20 Cal. 388.

SHAMARAO G. DHAIRYAWAN *v.* RAGHUNANDAN NANU KOTHARE, I.L.R. (1939) Bom. 228.

'The question in this case relates to the proper interpretation of S. 1 (2) of the Hindu Law of Inheritance (Amendment) Act II of 1929, whether the Act applies to cases of inheritance of Hindu females in respect of their stridhanam properties. It is well known that succession to stridhanam properties devolves in default of certain specified heirs on the heirs of the father of the deceased woman or on the heirs of her husband. S. 1 (2) of the Hindu Law of Inheritance Amendment Act enacts that it applies in respect only of the property of males. The question therefore arises whether it applies in cases of the stridhanam properties of females where the succession devolves on the heirs of the father or husband, whether they have to be fixed with reference to the provisions of the Act or without reference to the same as the Act does not apply to succession to females. The learned Judge has held that in finding out the father's or husband's heirs for this purpose the order has to be fixed in accordance with the provisions of the Act and that therefore the father's sister's son would take the stridhanam properties in preference to the father's distant sapindas. The reasoning of the learned Judge is that in such cases we have to find who the heirs of the father are and they have been fixed by the Act and that it is immaterial that the question is considered with reference to the succession to stridhanam properties. The same view has been taken by the Lahore High Court in *Mt. Charjo* v. *Dina Nath*[1] and the learned Judge in the present case has come to the same conclusion by his independent reasoning and it does not appear that the Lahore case was referred to before him. Mr. S. Srinivasa Aiyangar in his edition of Mayne's Hindu Law (Tenth Edition) observes in the footnote at page 84 that *Mt. Charjo* v. *Dina Nath*[1] overlooks the provisions of S. 1 (2) of the Act; but this hardly seems to be correct, as Tek Chand, J., refers specifically to the sub-section and construes it in the way that he does. The case under notice is another direct decision against the view of Mr. S. Srinivasa Aiyangar.

It is needless to add that in finding out the heirs of the father for this purpose it is immaterial that he died before the Act came into force, provided that the last owner died after the

1. A.I.R. 1937 Lah. 196 (2).

Act. (See *Lakshmi Ammal* v. *Anantharama Aiyangar*[1], *Mt. Rajpali Kunwar* v. *Sarju Rai*[2], *Shrimati Shakuntla Devi* v. *Kaushalya Devi*[3], *Pokhan Dusadh* v. *Mt. Manoa*[4], *Shankar* v. *Raghoba*[5] and *Shankarrao Dattatraya Nadkarni* v. *Shantibai Shankarrao Nadkarni*[6].)

GUNDA SUBBAYYA *v.* THE COMMISSIONER OF INCOME-TAX, MADRAS, (1939) 1 M.L.J. 451: I.L.R. (1939) Mad. 404 (F.B.).

Though Tek Chand, J., hoped as early as 1930 in *Muhammad Hayat-Haji Muhammad Sardar* v. *Commissioner of Income-tax, Punjab*,[7] that, considering the controversy in Courts, the legislature will take the earliest opportunity of redrafting and rearranging the clauses in S. 23 of the Income-tax Act, and the legislature also later amended and improved the Act in several important subjects, yet practically no change has been made in S. 23, cls. (3) and (4) regarding the scope of the two clauses. The exact scope of cl. (3) and cl. (4) of S. 23 with regard to the right of the Income-tax Officer to assess a recalcitrant assessee to *the best of his judgment* has been the subject of a wide conflict of decisions. The Division Bench in *Gopinath Naik* v. *Commissioner of Income-tax*[8] was divided in opinion with the result the question was referred to Sulaiman, C. J., who agreed with Niamatullah, J. The view taken in the case under notice is practically that of the other Judge Bapjai, J., in *Gopinath Naik* v. *Commissioner of Income-tax*[8].

Under the English Act in S. 121 both the cases covered by cl. (3) and cl. (4) are treated alike but for some reason the Indian Act has made a distinction between the two cases. A case under cl. (3) is appealable, while one under cl. (4) is not appealable. Cl. (4) empowers the officer to assess "to the best of his judgment" but cl. (3) says that he "shall assess the total income of the assessee" after hearing the evidence produced by the assessee and such other evidence as the Income-tax Officer may require on specified points. It is to be noted that the order

1. (1937) 2 M.L.J. 209: I.L.R. 1937 Mad. 948 (F.B.).
2. (1936) I.L.R. 58 All. 1041: A.I.R. 1936 All. 507 (F.B.).
3. (1935) I.L.R. 17 Lah. 356: A.I.R. 1936 Lah. 124.
4. (1936) I.L.R. 16 Pat. 215: A.I.R. 1937 Pat. 117 (F.B.).
5. A.I.R. 1938 Nag. 97.
6. (1938) 40 Bom.L.R. 1201: A.I.R. 1939 Bom. 50.
7. (1930) I.L.R. 12 Lah. 129 at 145 (F.B.).
8. (1935) I.L.R. 58 All. 200.

under cl. (3) is to be in writing. The case under notice has tried to give due weight to these considerations and come to a workable solution by holding that where the assessee fails to produce evidence on which the officer can make a proper assessment of his income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession and he must consider such material and make an assessment to the best of his judgment on such material. But the benefit of this view is practically taken away by also holding that though the officer should disclose to the assessee the ***material*** which he has gathered behind the back of the assessee, he need not disclose the *source* of his information. It has been repeatedly held that the evidence on which the officer acts need not be evidence satisfying the technical rules of the Evidence Act but if the proceedings from the stage when the officer issues notice under S. 23 (2) calling upon the assessee to produce evidence in support of the return are treated to be judicial as held by Sulaiman, C. J., in *Gopinath Naik* v. *Commissioner of Income-tax*[1] the logical result of the view would seem to be that the evidence should be taken in the presence of the assessee or within his knowledge (*see also* the observations of the learned Chief Justice at the top of page 409 of 1939 I. L. R. (Mad.). But the distinction drawn in the next observation at page 409, which is later incorporated into the judgment, between disclosure of the ***nature*** of the information and the disclosure of the *source* of such information seems, with all respect, to be more a distinction drawn from the practical difficulty to which the Income-tax Officer will be put to in gathering information.

The difference in the wording of cls. (3) and (4) and the difference in the effects of the orders under the respective clauses (by way of appealability or otherwise), coupled with the fact that though the officer is under cl. (3) acting judicially yet he is not bound by the technical rules of evidence, has been responsible for the sharp difference of opinion between decisions like *Ganga Ram Balmokand* v. *Commissioner of Income-tax*[2] on the one hand and *Gopinath Naik* v. *Commissioner of Income-tax*[1] on the other. In cases falling under cl. (4) it has been held in *S. P. K. A. A. M. Chettyar Firm* v. *Commissioner of Income-tax*[3] and *P. K. N. P. R. Chettyar Firm* v. *Commissioner*

1. (1935) I.L.R. 58 All. 200.
2. (1937) I.L.R. 19 Lah. 10.   3. (1929) I.L.R. 7 Rang. 669 (F.B.).

of Income-tax, Burma[1], that the officer must make the assessment according to rules of reason and justice, not according to private opinion, according to law and not humour and that it should not be arbitrary, vague or fanciful but legal and regular. It has also been held in In re *Binjraj Hukumchand*[2] and *Muhammad Sardar* v. *Commissioner of Income-tax, Punjab*[3], that the assessment can only be on the materials produced before the officer and not upon any figure of profits not warranted by evidence which they have before them. *Gopinath Naik* v. *Commissioner of Income-tax*[4], draws attention to the fact that S. 23 (3) uses the word 'evidence'. *Ganga Ram Balmokand* v. *Commissioner of Income-tax*[5], which takes the contrary view distinguishes these cases on the ground that they do not take account of the proviso to S. 13. But as rightly pointed out by the learned Chief Justice at page 414 in the case under notice S. 13 does not add to or take away anything from S. 23 (3) and has no bearing on the question under review. The decision in *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbanga*[6] has only added to the difficulty.

BHARI JENA *v.* GAURANGA CHARAN SAHU, (1939) I.L.R. 18 Pat. 210 and MAHBOOB KHAN *v.* MAJID HUSAIN, I.L.R. (1939) All. 403.

In these two decisions the question raised was whether in the absence of an application to set aside the sale, the deposit of the sums required by O. 21, r. 89 alone is enough to set aside the sale or an application for the purpose is absolutely essential. In the Patna case there was a proper deposit in time but a formal application to set aside the sale was not filed till 45 days after the sale, though the fact of the deposit was expressly brought to the notice of the presiding Judge on the 32nd day when the chalan showing the deposit was put up before him. The Court held that the sale could not be set aside for want of an application. In the Allahabad case the judgment-debtor "came to the Court with a form of tender for deposit of the sale price and 5 per cent. as required by O. 21, r. 89" in time but the "form of tender did not use the actual words that the sale

1. (1929) I.L.R. 8 Rang. 203. 2. (1931) I.L.R. 58 Cal. 1446 (F.B.).
3. (1930) I.L.R. 12 Lah. 129 (F.B.).
4. (1935) I.L.R. 58 All. 200. 5. (1937) I.L.R. 19 Lah. 10.
6. (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 (P.C.).

should be set aside" and there was no other application to set aside the sale. Yet the Court held that "it is clearly the intention of a person presenting this form to a Court for signature that the deposit is being made for that purpose", that is, for the purpose of having the sale set aside. This reasoning sounds like that of Ameer Ali, J., in *Abdul Latif Moonshi v. Jadub Chandra Mitter*[1], where the learned Judge says that "the fact of his depositing the amount is a sufficient indication of his intention to seek the relief which the law provides. He brings in the money with what object? Surely for no other reason but to have the sale of his holding set aside". *Abdul Latif Moonshi v. Jadub Chandra Mitter*[1], was a case under S. 174 of the Bengal Tenancy Act and cl. 2 of that section also relied on by Ameer Ali, J., speaks only of the *deposit* and not of an application but that portion of the judgment may not apply to a case under the Civil Procedure Code as O. 21, r. 92 (2) speaks also of an *application* under r. 89. The view taken in *Mathiji v. Kondaji*[2], that the essential on which the action of the Court is to depend is the deposit within the 30 days period and not the fact of application within that period has not generally found favour with the Courts and it has also expressly been dissented from (see *Pechiayee v. Vallaimuthi Velan*[3], *Venkata Narasimma v. Lakshmi Narasimham*[4], *Mahomed Akbar Zaman Khan v. Sukhdeo Pande*[5], *Venkatasubba Rao v. Narayana Rao*[6], *Nasiruddin Haider v. Hakim Muhammad Tahir*[7] and *Bur Singh v. Uttam Singh*[8]). Some cases have therefrom gone to the length of holding that the lodgment schedule cannot be treated as an application (*Venkatasubba Rao v. Narayana Rao*[6], *Chakrapani Padhi v. Krushno Naiko*[9] and *Sarvi Begum v. Haider Shah*[10]). But it is uniformly agreed that no special form of application is necessary, and that it may even be oral (*Murugappa Asari v. Shanmuga Mudaliar*[11], *Ramraj Singh v. Rabi Prasad*[12] and *Maniappa Annavi v. Harihara Aiyar*[13]) and it would therefore seem that it is a mere formality to insist on an application. In *Parat Veetil Seethi v. Ambalath Veetil Kolathur Ahmad*[14], even a formal prayer was not insisted on and when the petition was

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1. (1897) I.L.R. 25 Cal. 216.
2. (1905) 7 Bom.L.R. 263.
3. (1924) 48 M.L.J. 405.
4. (1916) 3 L.W. 174.
5. (1911) 13 C.L.J. 467.
6. A.I.R. 1922 Mad. 83.
7. A.I.R. 1936 Pat. 119 at 120.
8. (1910) 21 M.L.J. 100: L.R. 38 I.A. 13: I.L.R. 38 Cal. 355 (P.C.).
9. A.I.R. 1926 Mad. 620.
10. (1912) 9 A.L.J. 12: 13 I.C. 404.
11. A.I.R. 1925 Mad. 909.
12. (1921) 63 I.C. 140.
13. (1914) M.W.N. 62.
14. (1915) 32 I.C. 45.

filed, the Court allowed the addition of the formal prayer. That is responsible for the decisions in *Ramraj Singh* v. *Rabi Prasad*[1]; *Vannisami Thevar* v. *Periyasami Thevar*[2], where an oral application was presumed from the affidavit accompanying the deposit; *Abdul Latif Moonshi* v. *Jadub Chandra Mitter*[3] and *Maniappa Annavi* v. *Harihara Aiyar*[4]; see also *Banarsi Das* v. *Ram Chandra*[5], where an application for permission to deposit was treated as an application to set aside sale. It cannot be denied that this is an indulgence to the debtor and a strict compliance with the requirements of the section is necessary. It has accordingly been held that even a day's delay in depositing cannot be extended. *Mahomed Cassim* v. *A. J. David*[6], *Shashi Bhushan Banerjee* v. *Charushila Debi*[7], *Mahommad Din* v. *Sharampet*[8] and *Rameshwar Misser* v. *Sureshwar Misser*[9]. The Patna decision under review relies on *Baoji* v. *Bansilal Narain*[10] but in that case it is not clear if the judges relied for the decision on the absence of the application. There is no reference in the judgment to *Mathiji* v. *Kondaji*[11]. There were several other considerations referred to in the judgment. A prior application for the purpose had been dismissed and not appealed against and the application before the Court was more than 3 years old. The other circumstance referred to in *Baoji* v. *Bansilal Narain*[10] that the sale was confirmed may not matter, because if no application be necessary, then the confirmation after deposit may be treated as nullity. See *Murugappa Asari* v. *Shanmuga Mudaliar*[12], a case where an oral application had been made but the Court in ignorance of it had confirmed the sale. The Patna case evidently does not treat the chalan showing the deposit as an application, for otherwise the Court might have relied on that to give relief to the debtor. Though the chalan was put before the learned Munsiff on the 32nd day, the chalan must have been filed within the 30 days as it would have been filed with the deposit which was made in time and the delay of the Court to deal with the matter ought not to prejudice the party. (*Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande*[13] and *Munna Lal* v. *Parbhu Dayal*[14].)

1. (1921) 63 I.C. 140.
2. (1916) 3 L.W. 271.
3. (1897) I.L.R. 25 Cal. 216.
4. (1914) M.W.N. 62.
5. A.I.R. 1933 Lah. 210.
6. (1928) I.L.R. 6 Rang. 490.
7. (1916) 36 I.C. 809.
8. A.I.R. 19.6 Lah. 639.
9. (1917) 39 I.C. 664.
10. (1919) I.L.R. 43 Bom. 735.
11. (1905) 7 Bom.L.R. 263
12. A.I.R. 1925 Mad. 909.
13. (1911) 13 C.L.J. 467.
14. (1915) I.L.R. 37 All. 591.

T. L. WILSON *v.* HARI GANESH JOSHI, I.L.R. (1939) Bom. 307.

This decision is one of more than ordinary interest to lawyers as it relates to the question of the legality of contingent fees being settled in the event of the success of a litigation. A firm of solicitors in England agreed with a poor client in India that they would do her work in a case before the Privy Council for a smaller remuneration having regard to her poverty and that if she should succeed before the Privy Council she should pay the ordinary higher remuneration for his services. The learned Judges upheld the legality of the agreement and the solicitor was awarded the higher remuneration as the client succeeded before the Privy Council.

The question was decided with reference to S. 63 of the English Solicitors Act of 1932, 22 & 23 George V, Chapter 37, which provided that "Nothing in the four last preceding sections of this Act shall give validity to:—(*ii*) Any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding." Those preceding sections relate to the agreement for remuneration between solicitors and clients. The provision referred to above relates only to cases where the solicitor agrees to payment in the event of success; and the case under consideration was not one of that sort. The learned judges go on to observe that the provision is only aimed at champertous agreements and there is no rule of common law rendering the agreement in the case illegal.

The application of the rule to the other branches of the legal profession in this country seems to be by no means clear. In America where the conditions of the bar seem to be more analogous to those in this country, where with very few exceptions all members of the bar can both plead and act in a cause, the system of a contingent fee based on the success in the cause is not regarded as illegal or even unprofessional. *See* the American authorities cited in *Ganga Ram* v. *Devi Dasi*[1]. In England, on the other hand the system of contingent fees has been looked on with disfavour both for the barristers and the solicitors. See *Earle* v. *Hopwood*[2], a case of a solicitor who

1. 61 P.R. 1907 (F.B.).
2. (1861) 9 C.B.N.S. 566: 142 E.R. 222.

agreed to take his remuneration by a certain percentage of the successful issue in the cause and *Morris* v. *Hunt*[1] and *Penrice* v. *Parker*[2]. These decisions have been rested on the illegality of the agreements based on the rules against maintenance and champerty in England. In India, the English rules against maintenance and champerty as such have no force and it has been held an agreement cannot be held to be void merely for those reasons. (*Chedambara Chetty* v. *Renga Krishna Muthuvira Puchaiya Naicker*[3], *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*[4], *Subhadrayamma* v. *Poosapati Venkatapati*[5] and *Bhagawat Dayal Singh* v. *Debi Dayal Sahu*[6].)

The agreements may be bad for reasons such as undue influence, coercion or fraud which are quite different considerations. It may also be, having regard to the fiduciary relation between the legal adviser and his client, the burden may be on the former to make out that a *prima facie* unconscionable agreement was not brought about by undue influence, *cf.* S. 16 of the Indian Contract Act. Some Indian cases have gone further and held that such agreements are illegal as being opposed to public policy. Some of the judges who constituted the bench in *Ganga Ram* v. *Devi Das*[7], took that view, while the other Judges in the same case held the contrary. Reference may be made to the following cases where no uniform rule has been laid down, in this respect. *Achamparambath Cheria Kunhammu* v. *William Sydenham Gantz*[8], *Ramchandra Chintaman* v. *Kalu Raju*[9], *Shivram Hari* v. *Arjun*[10], *Parshram Vaman* v. *Hiraman Fatu*[11], In re *Bhandara*[12], *Radha Kishen* v. *Bakhtawur Lall*[13] and In the matter of *Moung Htoon Oung*[14]. We are not sure whether the views of some of the judges in the

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1. Chit 544.
2. (1673) Finch 75: 23 E.R. 40. 3. (1874) L.R. 1 I.A. 241 (P.C.).
4. (1876) L.R. 4 I.A. 23: I.L.R. 2 Cal. 233 (P.C.).
5. (1924) 47 M.L.J. 93: L.R. 52 I.A. 1: I.L.R. 48 Mad. 230 (P.C.).
6. (1908) 18 M.L.J. 100: L.R. 35 I.A. 48: I.L.R. 35 Cal. 420 (P.C.).
7. 61 P.R. 1907 (F.B.).
8. (1881) I.L.R. 3 Mad. 138 (F.B.). 9. (1877) I.L.R. 2 Bom. 362.
10. (1881) I.L.R. 5 Bom. 258. 11. (1884) I.L.R. 8 Bom. 413.
12. (1901) 3 Bom.L.R. 102 (F.B.). 13 (1869) 1 N.W.P. 1.
14. (1874) 21 W.R. 297.

above cases have not been tinged by the English rules against champerty and maintenance. The consideration that a legal practitioner may resort to improper practices to win the case to earn the higher fee in the event of success may apply with considerable force even for the original fee itself, which is not always paid in advance.

It is however one thing to say that such agreements are illegal and another to say that it is unprofessional for a lawyer to enter into such agreements. Recently the Madras High Court has held in In the matter of *Ramanujachariar*[1], that an agreement between an advocate and his client to take a certain percentage of the proceeds in a suit as a remuneration only in the event of success amounts to professional misconduct. The decision under review may, we venture to think, be taken to lend countenance to the view if a legal practitioner agrees to take a smaller fee having regard to the poverty of the client and that in the event of success to take the full regulation fee, it is neither illegal nor unprofessional.

DEVA DUTTA SAROGI & SON *v.* P. C. MITTER & SON, I.L.R. (1939) 2 Cal. 143.

This decision lays down what has generally been assumed in all the prior decisions that the word "assets" used in S. 73 of the Civil Procedure Code cannot be understood in the wider sense as including every kind of property but that it only means monies. This is made clear by the succeeding words in the section referring to its realisation and distribution among the money decree-holders. In *Ramanathan Chettiar* v. *Subramania Sastrial*[2], "assets" in the corresponding section of the old Code of 1882 has been held to mean the proceeds of the sale of the properties sold in execution which can only be in money. A similar meaning was given to it by Sir Lawrence Jenkins, C. J., in *Manilal Umedram* v. *Nanabhai Maneklal*[3], referred to by the learned Judge in this case. The prior cases on the point were referred to and reviewed in *Umar Sharif* v. *Rodba*[4]. Consequently the learned

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1. (1939) 2 M.L.J. 320 (F.B.).
2. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
3. (1903) I.L.R. 28 Bom. 264 at 274. 4. A.I.R. 1925 Nag. 157.

Judge held in the case under notice that where the properties were only taken possession by a receiver appointed in execution and they were not sold and their proceeds were not received by him, there were no "assets realised in the course of execution or otherwise", within the meaning of S. 53 of the Presidency Towns Insolvency Act which uses words similar to S. 73 of the Civil Procedure Code in this respect. There can be no doubt that the same would be the view even under S. 51 of the Provincial Insolvency Act of 1920 where similar expressions are used.

ANWAR ALI BEPARI *v.* JAMINI LAL RAY CHAUDHURI, I.L.R. (1939) 2 Cal. 254.

In this case, the learned judge has held that a notice to quit is invalid because it was not served on the heirs of one of the joint lessees but was only served on the surviving lessee. The argument was advanced that on the death of one of the lessees his interest was not heritable and that the surviving tenant was the only person entitled to the leasehold and as the notice was served on him it was valid. This argument was overruled and the learned judge held that a leasehold interest was heritable. Even taking that the heirs of the deceased lessee were jointly entitled with the surviving tenant to the leasehold, the question will still remain whether the notice to quit should be served on all of them.

In England, it was held by Lord Ellenborough, C. J., in the early case of *Macartney* v. *Crick*[1], that where a property was held by lessees jointly, service of notice to quit on one of them alone was a sufficient notice to quit. This decision has been referred to without disapproval or dissent in the leading English treatises on Landlord and Tenant. *See* Woodfall's Law of Landlord and Tenant, 20th Edition, page 428. Foa on Landlord and Tenant, 5th Edition, page 605. In another case, it was held that service on one of the joint lessees was *prima facie* proof of the service on all of them until it was disproved. (See *Doe* v. *Watkins*[2].) In India, the requisites of a valid notice to quit have been enacted in S. 106 of the Transfer of Property Act and the question is whether it lays down a different rule on this point. It has been laid down by the Privy Council in *Harihar Banerji* v. *Ramshashi Roy*[3], following the English cases referred to above, that the service of a notice to quit on one of the joint tenants is *prima facie* evidence that it has reached the others. This rule has no application where the rights of the other co-tenants have been ignored as in this case under notice. (See also *Bejoy Chand Mahatab* v. *Kali Prasanna Seal*[4]). If, on the other hand, the rights of the other joint lessees are not ignored, the notice served on one of the joint tenants will be *prima facie* proof of service on the other joint tenants as well. (See *Bodordoja* v. *Ajijuddin Sarkar*[5], *Rajoni Bibi* v. *Hafison-*

1. (1805) 5 Esp. 196. 2. (1806) 7 East 551: 103 E.R. 213.
3. (1918) 35 M.L.J. 707: L.R. 45 I.A. 222: I.L.R. 46 Cal. 458 (P.C.).
4. (1925) 29 C.W.N. 620. 5. (1929) I.L.R. 57 Cal. 10.

nissa B bi[1] and *Kedar Nath Sadhukhan* v. *Madhu Sudan Das*[2].) If, however, it is proved that the notice did not reach the other joint lessees, the notice, it would seem, will be invalid both under the English and the Indian Law.

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KRISHNADAS PADMANABHRAO CHANDAVARKAR *v.* VITHOBA ANNAPPA SHETTI, I.L.R. (1939) Bom. 340 (F.B.).

This decision of the Full Bench of the Bombay High Court which lays down that a judgment against an infant cannot be set aside by reason of the gross negligence of his next friend or guardian *ad litem* is at variance with the uniform current of later decisions on this point in all the High Courts including the Bombay High Court which have been referred to in the arguments and the judgment in this case. The learned Chief Justice gave expression to this view in a prior decision by him as a single judge in *Auraj Joharmal Marwadi* v. *Dalpat Supadu*[3], and the other learned judges who were inclined to think that the question required fuller investigation in their order of reference, finally agreed with him though with some hesitation.

In coming to this conclusion the learned Chief Justice has examined the English Law on this point and quoted the statements in the leading text books which are contrary to his view but held they are not correct. The passages in Simpson on Infants, 4th Edition, page 424, Seton on Judgments and Decrees 7th Edition page 939 and Halsbury's Laws of England 2nd Edition, Vol. XVII, page 708 and the observations of Lord Hardwicke as early as 1747 in *Gregory* v. *Molesworth*[4] and Malins, V. C., in In re *Hoghton*: *Hoghton* v. *Fiddey*[5], are sufficiently weighty authorities under the English Law that a judgment against an infant can be reopened for gross negligence on the part of his next friend or guardian *ad litem*. The fact that the question was not considered in those ancient cases in all its fulness or that the question did not arise directly for decision is sufficiently met by the fact that they have been recognised as laying down the law correctly by the leading text books of authority and there is no direct decision to the contrary in England to this day. Among other text books may be mentioned Macpherson on Infants, page 346, referred to in *Brij Raj* v. *Ram*

1. (1900) 4 C.W.N. 572. 2. A.I.R. 1923 Cal. 682.
3. I.L.R. (1937) Bom. 839: A.I.R. 1937 Bom. 464.
4. (1747) 3 Atk. 626: 26 E.R. 1160. 5. (1874) L.R. 18 Eq. 573.

Sarup[1] and Trevelyan on Minors, 6th Edition at page 284. In the face of such a large body of legal opinion to the contrary, we are not sure that this decision of the Bombay High Court will start another course of unsettlement on the point. If it is recognised that a judgment against a minor can be reopened by reason of the gross negligence of the next friend or guardian *ad litem*, there can be no doubt that a suit will be a more appropriate and effectual means of vacating the prior judgment, than a review whose limits are strictly circumscribed by the Civil Procedure Code.

CHARANDAS VASSANJI *v.* DOSSABHAI MAGANLAL, I.L.R. (1939) Bom. 389.

The question whether the Court in settling a sale proclamation is under a duty to arrive at and state its own estimate of the value of the properties to be sold furnished a fruitful source of conflict of decisions in the various High Courts and an additional ground was furnished to the judgment debtor for an application to set aside the execution sale and delaying the decree-holder from realising the fruits of his decree. The High Courts of Madras and Allahabad however held that the Court was not bound to arrive at and state its own estimate of the properties brought to sale, in the proclamation of sale. *Thiruvengadaswami Aiyangar* v. *Govindaswami Udayar*[2] and *Muhammad Said Khan* v. *Muhammad Abdus Sami Khan*[3], while the Calcutta and the Patna High Courts held the contrary. *Banbihari Chatterji* v. *Bhukhanlal Chaudhuri*[4], and *Munshi Raghunath Singh* v. *Hazari Sahu*[5]. In the decision under notice, the learned judges have agreed with the view held in Madras and Allahabad and held that the Court is under no duty to arrive at and state the value of the properties to be sold in the sale proclamation and the learned Chief Justice has pointed out how the decision of the Privy Council in *Saadatmand Khan* v. *Phul Kuar*[6] has been misunderstood as being an authority for the contrary view. In many of the provinces, the point is now only of academic interest as the High Courts of Madras,

1. (1925) I.L.R. 48 All. 44.
2. (1927) 55 M.L.J. 363: I.L.R. 51 Mad. 655.
3. A.I.R. 1932 All. 664.
4. (1932) I.L.R. 60 Cal. 581.
5. (1917) 2 Pat.L.J. 130 (F.B.).
6. (1898) L.R. 25 I.A. 146: I.L.R. 20 All. 412 (P.C.),

Patna, Lahore, Rangoon, Nagpur and the North-West Frontier Province have framed rules under their rule making power and added a further clause to O. 21, r. 66 or further words rendering it unnecessary for the Court to fix the value of the properties to be sold. After these alterations to the rule, it is sufficient if the value as given by the parties is stated in the sale proclamation. It is a matter for the consideration of the Bombay High Court if a similar alteration in the rule should not be made by that High Court also to obviate any different view being taken in the future by that High Court leading to a conflict of decisions.

INDERDEO SINGH *v.* RAMLAL SINGH, (1939) I.L.R. 18 Pat. 429.

The question in this case was as to the article of the Limitation Act that governs a suit by a mortgagee on the personal covenant contained in the mortgage-deed, when the mortgage is vitiated by reason of the doctrine of fraud on registration. The bond was registered at Tikari by adding in the description of land a piece of land at Tikari which entry was found to be fictitious and it was also found that the mortgagor and the mortgagee were parties to the fraud. The bond was therefore rightly held to be invalid as a mortgage but as the suit was within six years, the mortgagee claimed a personal decree against the mortgagor. It is here that there is a definite cleavage of opinion between the Madras High Court and the Calcutta High Court and the difference of view is largely based on the exact scope of the judgment of the Judicial Committee in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*[1]. The Madras High Court has held in a considered judgment in *Rama Rao* v. *Vissapragada Vedayya*[2], that though the document may be invalid as one obtained by a fraud on the registration law, yet the document is registered and falls within Art. 116 of the Limitation Act. It has uniformly been held that a claim to enforce the personal covenant contained in the mortgage-deed is a claim "for compensation for the breach of a contract in writing registered" and is governed by Art. 116, though Mr. Justice Mitter doubts the correctness even of this view in

1. (1921) 40 M.L.J. 489: L.R. 48 I.A. 127: I.L.R. 48 Cal. 509 (P.C.).
2. (1922) 44 M.L.J. 573: I.L.R. 46 Mad. 435.

Sailendra Nath v. *Keshab Chandra Chowdhury*[1]. (See *Vasanji Kalianji* v. *Erachsha Dossabhai*[2], *Maharaj Bahadur Singh* v. *Abdul Majid*[3], *Chengalamma* v. *Veeraraghava*[4], *Ratnasabapathy Chettiar* v. *Deivasigamani Pillai*[5], and *Radhakrishna* v. *Tej Saroop*[6].) It has also been held that where a mortgage fails as a mortgage for want of attestation, or other causes, yet it is to be treated as a registered contract and is governed by Art. 116. (See *Dinkar Hari* v. *Chhaganlal Narsidas*[7], *Ram Narayan Singh* v. *Adhindra Nath Mukherji*[8], *Sonatun Shaha* v. *Dino Nath Shaha*[9] and *Joginee Mohan Chatterjee* v. *Bhoot Nath Ghosal*[10]). But in *Sailendra Nath* v. *Keshab Chandra Chowdhury*[1] it is held that where the mortgage is invalid as in fraud of registration, then it is a case where the parties are guilty of fraud and a mortgagee who is a party to such fraud should not be allowed to take advantage of it. With all respect, this reasoning overlooks the fact that he is not seeking to take advantage of the fraud because the fraud consisted in trying to get a mortgage right over it. Logically pursued, the Court may have to hold that the document could not be sued on even in three years under Art. 66. As pointed out by the learned authors of the sixth edition of Mitra's Limitation "so far as the personal covenant on the part of the mortgagor is concerned the instrument may be considered as being duly registered, for under S. 29 of the Registration Act there is no restriction as to the place of registration with respect to persons executing or claiming under the instrument". The learned authors point out that in this view *Kalka* v. *Mathura Das*[11] is open to doubt. The Oudh Court has later held that *Kalka* v. *Mathura Das*[11] is not correctly decided. It was in this form that the argument was advanced in the case under notice by Mr. Sarjoo Prasad when he suggested that "it should be considered that there was no fraud in obtaining registration so far as the personal covenant was concerned, because if the bond had contained nothing but the personal covenant, the provisions of

1. (1937) 41 C.W.N. 783. 2. (1934) I.L.R. 59 Bom. 634.
3. (1938) 68 C.L.J. 109. 4. (1928) 55 M.L.J. 506.
5. (1928) 56 M.L.J. 10: I.L.R. 52 Mad. 105 (F.B.).
6. (1929) I.L.R. 52 All. 363: A.I.R. 1930 All. 69 (F.B.).
7. (1913) I.L.R. 38 Bom. 177.
8. (1916) 32 M.L.J. 39: L.R. 44 I.A. 87: I.L.R. 44 Cal. 388.
9. (1898) I.L.R. 26 Cal 222. 10. (1902) I.L.R. 29 Cal. 654.
11. (1918) 50 I.C. 220.

S. 29 of the Registration Act would have applied and the document could have been registered at any registry office" but the argument has been negatived as having the effect of calling the document something other than what it is. In *Sailendra Nath* v. *Keshab Chandra Chowdhury*[1] and *Jogeshwar Prasad Onkar Prasad* v. *Mulchand*[2], the difficulty felt is that as the effect of fraud on the Registration Law affects the deed as a whole, it cannot be said that the deed is to be treated as an unregistered document for one purpose and a registered document for another. With respect, this assumes that fraud vitiates the whole deed and not merely the mortgage nature of it. As Mr. Justice Phillips points out at page 438 in *Rama Rao* v. *Vedayya*[3], there was no fraud on the Registration Law in so far as the document evidenced a mere covenant to pay, and to extend the invalidity also to that part of it will be "to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud". A document may be invalid in some parts but valid in other parts, provided they are separable parts.

Apart from *a priori* discussions based on these general aspects of the question, the real difficulty is caused by the course adopted by the Judicial Committee in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*[4] and the view of the Madras High Court receives large support from the arguments in that case as extracted in the report of the case in *Biswanth Prasad* v. *Chandra Narayan Chowdhury*[4]. But the Calcutta High Court and following it, Nagpur and Patna High Courts do not agree with that interpretation of *Biswanath Prasad's case*.[4]

[END OF VOL. II.]

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1. (1937) 41 C.W.N. 783.
2. A.I.R. 1939 Nag. 57 (F.B.).
3. (1922) 44 M.L.T. 373: I.L.R. 46 Mad. 435.
4. (1921) 40 M.L.J. 489: L.R. 48 I.A. 127: I.L.R. 48 Cal. 509 (P.C.).